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In The

Supreme Court of the United States

October Term, 1994

WVCH, COMMUNICATIONS INC.; THOMAS H. MOFFIT and ALICE E. MOFFIT,

Petitioners,

vs.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING RESEARCH GROUP and SUE TIEFENTHALER,

Respondents,

-and-

WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a citizen's rights to substantive due process under the Fourteenth Amendment be violated by years of intentional, biased, and politically motivated delay in a local hearing process irrespective of when, or if, the state should grant the property right sought, particularly when the delay is deliberately and knowingly based on matters having virtually no relationship to the purpose or jurisdiction of the hearing body?

2. Is the preemptive power of the Federal Communications Commission to locate and license AM/FM radio stations subject to control by local zoning schemes?

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No.

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PETITION FOR WRIT OF CERTIORARI

The petitioner WVCH Inc. a licensed radio station, and Thomas H. and Alice E. Moffit the owners thereof, by and through their Attorney Don Bailey, respectfully requests that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit entered on May 4, 1994 denying petitioners' claim that the politically and personally motivated intentional delay, for years, in the evaluation of an application to a zoning hearing board for a permit, on knowingly unrelated grounds, constituted a violation of petitioners' Fourteenth Amendment substantive due process rights to be free from an intentional abuse of government power in the absence of a reasonable government purpose. The review should also include the issues of the petitioners' and the public's First Amendment Rights in the preemptive power of the Federal Communications Commission, and the purposes of the Federal Communications Act, under the Commence Clause as contrasted with the powers of a local zoning hearing board to pre-empt, in the name of individual property rights under the Tenth Amendment, the broader individual and national interest in radio and television broadcasting.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit upholding the District Court was filed on May 4, 1994. A motion for reconsideration was denied on June 1, 1994. The Order denied the Petitioners' claim for relief under 42 U.S.C. § 1983. Earlier orders of the United States District Court for the Eastern District of Pennsylvania denied petitioners' request for declaratory and injunctive relief also under 42 U.S.C. § 1983. The District Court Memorandum and Order entered on December 23, 1992 upholding petitioners' claim and dismissing certain respondent's Fed. R. Civ. P 12 (b)(6) motions is attached hereto and marked Appendix D. The District Court Memorandum and Order vacating the December 23, 1992 decision and dismissing both petitioners'

first and second complaint which was entered on July 15, 1993 is attached hereto and marked Appendix C. The Third Circuit order upholding the District Court is attached hereto and marked Appendix B. The Third Circuit Order denying rehearing is attached hereto and marked Appendix A.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 4, 1994 (App. B). The order of the United States Court of Appeals for the Third Circuit denying petitioners' request for a rehearing was entered on June 1, 1994 (App. A). The jurisdiction of this Court is based on Rule 10.1 (c) of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

First Amendment to the United States Constitution:

> Congress shall make no law respecting or establishing religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article I, Section 8 of the Constitution of the United States:

> Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

STATEMENT OF THE CASE

Petitioners are an AM/FM radio station and its owners who provide religious broadcasting services and public services over the airwaves. In early 1989 the petitioners located a piece of ground zoned Agricultural/Residential in Upper Providence Township Montgomery County, Pennsylvania. It was necessary to move WVCH from Chester County Pennsylvania to allow broadcasting at a much higher power in order to add millions to the station's listening area. The move was necessitated by the demands for WVCH programming in the Philadelphia/Camden/ Wilmington areas and it was required by the FCC in order to allow for a needed increase in signal strength. When Tom Moffit first applied for a building permit in Upper Providence Township he was told by Township officials that it would be no problem. An engineering study on the real estate had revealed it to be an ideal location to meet FCC site approval requirements, not just geologically, but because it created no interference with other stations. Radio broadcasting is preemptively controlled by the FCC. The location of radio broadcasting stations, particularly "AM" stations is extremely limited geographically. This is because they take up considerable acreage and also because of the need to avoid interference from overlapping broadcasting patterns with other stations. When these natural limitations are overlaid on typical zoning maps there is often no place where "AM" radio stations can even be located. But Upper Providence Township seemed an ideal location. There were no apparent zoning restrictions because radio stations were not included in the local zoning scheme but were allowed by the county. The erection of the

broadcast towers were entirely consistent with permitted agricultural uses taking little actual space themselves. There were no height restrictions. A house to be used as a studio already existed on the property which was an old farm. Local counsel had advised WVCH to go forward. A political nightmare soon developed however. The land Moffit had purchased for WVCH, at approximately one-half its market value because of the prior landowner's sympathetic religious views, was highly prized for development purposes. The president of respondent Rhone-Poulenc Rorer, a French-owned drug company, wanted the WVCH land for his personal use. He offered the Moffits' what WVCH had paid for the land knowing it was an unusually low price. The Moffits' refused. They were then threatened by Rorer's lawyers, who promised Moffit that WVCH would never be built after the conclusion of a frivolous meeting. With their sister drug company Sterling, Rorer then orchestrated a carefully executed political and pseudo-legal plan to sap the petitioners of their personal resources through a preconceived conspiracy to intentionally delay the Zoning Hearing Board process. The delay consisted of 3 years of deliberately drawn out hearings conducted in a circus atmosphere. More than 80% of this hearing time was spent on a *de novo* evaluation of WVCH's FCC application and on radio frequency interference (RFI). RFI is totally preempted by the FCC. Even after formal evidence of that fact was promptly brought to the Zoning Hearing Board's attention the Board dismissed FCC preemption out of hand declaring simply that the Board "didn't care". One Board member, a Mr. McLaughin, quit in disgust. He declared that the WVCH hearings should have taken no more than half a dozen meetings and that the drug companies were involved in irregularities with the Board. Albeit he did not allege any personal bribes or misconduct by Board members. However the chairman of the Board, Clay Hess, is treasurer of one of the major political parties in Montgomery County. He had indicated 2 years earlier to a witness that he was going to favor the drug companies' wishes on the WVCH matter. His brother was employed by Rorer's counsel.

During the hearing process, fraudulently qualified experts, among others, were used by the drug companies to advance groundless fantasies about AM radio. These included claims of how AM radio could make bed-springs and kitchen appliances play music, cause cancer, and even shock children who touched metal objects up to miles away. The drug companies' other contention was that WVCH would interfere with laboratory equipment. That was simply impossible, at least if the drug companies were following federal law in their building practices, which, incidentally, they claim they were. Meanwhile, the only other Zoning Hearing Board Member, the respondent Walter Kalil, was doing tens of thousands of dollars worth of printing business with respondent Spring Ford School Board who was brought in and made a part of the anti-WVCH effort in front of the hearing board upon which Kalil sat as a member. Then a local citizens' group was formed. Its activities were in part unlawfully funded and promoted by the Zoning Hearing Board itself. The personal and financial relationships between and among the law firms, complainants before the Board, Township Supervisors who appoint the Board, and particularly Board members themselves, constituted numerous ethical and legal conflicts. None were disclosed to WVCH or the Moffits before or during the hearing process.

Procedurally this case began as a request by WVCH to Upper Providence Township for permission to begin building their radio broadcasting facility. The resultant refusal by the township led to hearings which were intentionally dragged along for more than three years. The vast majority of these hearings did not relate in any way to any real or potential interests the Moffits' or WVCH may have had in the building permit requested. The only legal issue, if at all, was whether the township zoning ordinance was exclusionary. And when the Zoning Hearing Board finally rendered a decision denying WVCH's request for a building permit, it never even mentioned the issue of radio frequency interference that it had spent 2 1/2 years on. This was done intentionally to avoid the

pitfalls of an appeal on that issue in state court. Thus petitioners could not respond under state law to this pre-planned intentional abuse. State law prevented any possibility of appealing the Boards' abuse on the frivolous part of the hearings over RFI, while preserving of course, the simple exclusionary issue that could be appealed at petitioners' choice to Common Pleas court. State sovereign immunity statutes prevent the possibility of recovery against the Board or its members for damages and furthermore require termination of proceedings in favor of a plaintiff in order to make out a cause of action to begin with. So while WVCH was finally able to appeal the denial of the permit itself under Pennsylvania law to the Court of Common pleas, the only recourse for the injuries suffered by petitioners was through 42 U.S.C. § 1983 because the grounds for appeal by virtue of the zoning hearing boards' action in not mentioning the frivolous hearings in their decision excluded consideration of their pretended jurisdiction over RFI.

Petitioners filed their first Civil Rights Complaint on October 5, 1992 in the United States District Court for the Eastern District of Pennsylvania. They requested injunctive and declaratory relief in addition to a request for money damages. Because an avenue of appeal existed in state court as to interpretations of the structure and application of the ordinance in question, the District Court denied the possibility of injunctive and declaratory relief but agreed to accept jurisdiction of the case for consideration of the damages claim. On December 23, 1992, in a detailed memorandum opinion, the District Court upheld petitioners' contention that they had made out a cause of action for the deprivation of their substantive due process rights under the Fourteenth Amendment. Shortly thereafter, through discovery and further investigation, petitioners discovered more evidence of egregious misconduct by the defendants below. On April 27, 1993 petitioners filed a second complaint against the individual Zoning Hearing Board members and the local School Board who, petitioners claimed, had become

involved in the wrongdoing for financial and political reasons. On July 15, 1993 the District Court issued a memorandum and order dismissing both complaints, *i.e.*, dismissing the second complaint out of hand, and reversing itself and dismissing the second complaint based upon an interpretation of a then recent Third Circuit case *Taylor Invest. Ltd. v. Upper Darby Township*, 983 F.2d 1985 (3d Cir. 1993). Petitioners appealed to the Third Circuit and oral argument was granted for March 7, 1994 after all parties submitted their briefs. The oral argument went well over the allotted time. Petitioners asked the Third Circuit to review the issue of whether an intentional, deliberate delay for other than reasonable government objectives accompanying a denial on grounds unrelated to the intentional delay, could ever constitute a substantive due process violation of a citizen's Fourteenth Amendment Rights. Petitioners also asked the Third Circuit whether local zoning schemes can negate and vacate the federally preempt powers of the FCC to determine where radio stations can be located, particularly where placing the station is *prima facie* consistent with the allowed land use in question. Petitioners also asked whether millions of citizens and their opportunity to enjoy a federally preempted, heavily regulated and extremely scarce recourse depended upon by the entire nation for information, must be denied those opportunities to participate and listen because a general zoning scheme pretends to preclude the possibility of building a non-obtrusive broadcasting facility in a particular municipality, or should the rights of all citizens to enjoy the limited broadcast spectrum of AM/FM radio through the constitutional prerogatives of the First Amendment and the Commerce Clause prevail over individual property interests ostensibly protected by a local zoning board, *i.e.*, should the broader interests of petitioners, and indeed all citizens, in the limited availability of the radio broadcast spectrum, regulated by the federal government pursuant to the Commerce Clause in furtherance of the First Amendment interests of all those same citizens, be subject to control by one municipality in the name of local property rights. Petitioners

concluded oral argument with a request to the Third Circuit to define the nature of the interests violated reviewing the damage here as akin to abuse of process, a liberty interest protected by the due process clause of the Fourteenth Amendment. The court then concluded argument with a request for limited additional briefing. On May 4, 1994 the Third Circuit issued a one sentence opinion affirming the lower court's decision. Petitioners appealed to the court en banc for reconsideration but were denied on June 1, 1994.

REASONS FOR GRANTING THE WRIT

I.

A CITIZEN'S RIGHT TO SUBSTANTIVE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT IS VIOLATED BY YEARS OF INTENTIONAL, BIASED, AND POLITICALLY MOTIVATED DELAY IN A LOCAL HEARING PROCESS IRRESPECTIVE OF WHEN, OR IF, THE STATE SHOULD GRANT THE PROPERTY RIGHT SOUGHT, PARTICULARLY WHERE THE DELAY IS DELIBERATELY AND KNOWINGLY BASED ON MATTERS HAVING VIRTUALLY NO RELATIONSHIP TO THE PURPOSE OR JURISDICTION OF THE HEARING BODY.

According to the Third Circuit's own decisions the alleged misconduct in this case would be a clear example of the "deliberate and arbitrary abuse of government power." *Bello v. Walker,* 840 F.2d 1124 (3d Cir), *cert. denied*, 488 U.S. 851, 868, 109 S. Ct. 134, 176, 102 L. Ed. 2d 107, 145 (1988). (App. 22a, 23a). However, the Third Circuit, by upholding the District Court in the case at bar, requires a citizen to prevail on the merits of a building permit application, and thus prove their entitlement to a property interest, before that citizen can prevail on any substantive due process claim

no matter how irrelevant, outrageous, or injurious, the state's abuse of the hearing process itself might be. (App. 10a). If the citizen can't eventually prevail on the merits of their land use application, they can claim no injury for deprivations of other rights. This scenario creates a constitutional Catch-22 for the citizen. It even gives a state the right to decide, in a context of intentional abuse such as the frivolous delay we see here, whether it will bestow the property right that would make the abuse actionable — but only if the state grants the permit. Here the Third Circuit is vicariously interpreting *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) in a wrongfully limited sense, *i.e.*, that *only* property rights are at issue under the facts outlined here while ignoring a citizen's interest in a fair hearing itself. "A property interest subject to protection by the due process clause results from a 'legitimate claim of entitlement' created by an independent source such as state law." *Midnight-Sessions, Ltd. v. Hock City of Philadelphia*, 945 F.2d 667, 679 (3d Cir. 1991) interpreting this Court's decision in *Brown* above. The Third Circuit simply stops short. Their view improperly identities only state created property rights, as opposed to a proper appreciation of a citizen's liberty interests akin to an abuse of process, in situations where the hearing process itself is intentionally misused. If a citizen has no choice but to go before a zoning hearing board to gain approval for using his property in certain ways, then he is being subjected to the states exercise of its police powers. These powers are exercised not just over his potential property interests, but over his person as well during the hearing process itself. If he must subject himself to the requirements of the states procedure in his quest for a state granted property right, he is entitled to a fair and reasonable hearing process in and of itself. Thus, if the state, in exercising its control over that citizen's quest for a property interest, makes a citizen stand before it for irrelevant, ulterior reasons designed to harass and intimidate the citizen for a period of years, then the citizen has been deprived of a due process liberty interest which is unrelated to, and not dependant upon, whether he ever prevails in his quest

for permission to use his property subject to the state's consideration.

Thus, according to the holding below, if the state correctly denies a property interest, there can be no recovery for abuse of the hearing process itself no matter how cruel or unrelated that abuse may be to the property issue itself. Such a proposition renders substantive due process under the Fourteenth Amendment virtually meaningless, unless and until, a citizen can prevail on a hoped for claim to a state created property interest. This view sees only property interests at stake in a zoning hearing process and ignores a citizen's right not to have the hearing process itself used as an instrument of extreme abuse for unrelated purposes. Strangely the Third Circuit seems to be thinking in terms of *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), which assumes that a state hearing process itself is at least relevant to the subject before it. *Parratt* focuses on whether a state provides a meaningful post deprivation remedy, *i.e.*, a meaningful process for evaluating the merits of a property claim. *Parratt* does not address matters such as a person's liberty interest to be free from being forced to go through an irrelevant, elongated hearing process designed to harass and intimidate him. *Parratt* is not a substantive due process case decided in the context of a intentional abuse of government power. The Supreme Court recognized that fact when it wrote *Parratt*. In fact the syllabus to the Lawyers Edition citation of the case (68 L. Ed. 2d 420) at page 424 states "there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers, the state action not necessarily being complete in the latter situation." But the question here relates to neither. Because there are separate and different rights violated by abusing and misusing the hearing process itself which has nothing to do with whether procedural due process is adequate or whether there is an entitlement to the property right in question under state law. Those separate rights are our substantive

due process rights to be free of abusive and intentional government actions unrelated to any reasonable government end. They are akin to an abuse of process or misuse of process that rises to a substantive level when the misconduct is so egregious. If this were not so, we wouldn't need a Fourteenth Amendment — it would serve no end at all. According to the Third Circuit, unless the state grants us an enforceable right, we have no claims for the way we're mistreated during a hearing process. All the state has to do to avoid a 42 U.S.C.A. § 1983 action is make sure the mistreatment doesn't relate to a state created property interest. That is precisely what was done for precisely the above reason in this case. *Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986) clearly governs this case, but the Third Circuit failed to interpret and apply it, even though the due process issue therein was clearly before them. Mr. Justice Rehnquist, writing for a unanimous Supreme Court in *Daniels,* took great pains to describe the history and parameters of substantive due process rights under the Fourteenth Amendment. Merely because *Daniels* was factually about negligent conduct of state officials and certain interpretations of *Parratt,* does not mean that the carefully analyzed and articulated guidance of the Supreme Court of the United States should be ignored. At page 331 of the *Daniels* decision the Supreme Court discussed what the meaning of the due process clause is today and what it has meant historically.

> The Due Process Clause of the Fourteenth Amendment provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law." Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property. E.g., Davidson v. New Orleans, 96 U.S. 97 (1878) (assessment of real estate); Rochin v. California, 342 U.S. 165 (1952) (stomach

pumping); Bell v. Burson, 402 U.S. 535 (1971) (suspension of driver's license); Ingraham v. Wright, 430 U.S. 651 (1977) (paddling student); Hudson v. Palmer, 468 U.S. 517 (1984) (intentional destruction of inmate's property). No decision of this Court before Parratt supported the view that negligent conduct by a state official, even though causing injury, constitutes a deprivation under the Due Process Clause. This history reflects the traditional and common-sense notion that the Due Process Clause, like its forbearer in the Magna Carta, see Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911), was "intended to secure the individual from the arbitrary exercise of the powers of government," Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okely, 4 Wheat. 235, 244 (1819)). See also Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 U.S. 114, 123 (1889)"); Parratt, supra, at 549 (Powell, J. concurring in result). By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g., Rochin, supra, it serves to prevent governmental power from being "used for

> purposes of oppression," Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 277 (1856) (discussing Due Process Clause of Fifth Amendment).

If the Fourteenth Amendment does not prohibit the abuse alleged under the facts in this case then any state or local government is free to concoct any subterfuge they please to harass and intimidate a citizen who must come before them to seek a state created property right. The "touchstone of due process is the protection of the individual against the arbitrary actions of the government". *Wolfe v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935. The Third Circuit not only misapplied its own case law but failed to properly apply standards laid down by the Supreme Court of the United States. In so doing it interpreted the facts in *Bello* above, where the injured parties apparently did gain their permit rights, to mean that the state must grant a property right, pursuant to its own law, before a citizen abused through unjust delay can litigate the violation of other separate rights protected and guaranteed under the Fourteenth Amendment. The Court also misapplied *Taylor v. Upper Darby Township*, 983 F.2d 1285 (3d Cir. 1993) which is also its own case. *Taylor* is clearly a ripeness case and in fact supports petitioners' contention that petitioners could do nothing under Pennsylvania law while before the Upper Providence Township Zoning Hearing Board, *i.e.*, they could only seek relief once the Board made its final decision. This they did.

II.

THE PREEMPTION POWERS OF THE FEDERAL COMMUNICATIONS COMMISSION TO PLACE AND LICENSE AM/FM RADIO STATIONS IS NOT SUBJECT TO CONTROL BY LOCAL ZONING SCHEMES.

Also before the Third Circuit was a question of federal preemption pursuant to the Commerce Clause in conflict with local zoning powers. This was a question of first impression for the Third Circuit under the facts in this case, to the best of petitioners' knowledge. Federal law has evolved two types of implied federal preemption where our courts have not been able to discern an express statutory provision granting it. Petitioners do not argue that the FCC has expressly pre-empted local ordinances as to the location of AM/FM radio stations. However it is physically impossible to locate directional AM radio broadcast systems without at least tens of acres to accommodate the buried ground arrays that radiate from the 4 to 6 towers needed. These systems are not ungainly or ugly, create no hazards of any type, and are quite compatible with any zoning use, but particularly with agricultural uses where they create good pasture and ground crop conditions. But the sites where these systems can be located, because of signal interference with other stations, and because of geological considerations, is extremely limited to a small number of locations. Certainly field preemption, which is where the federal regulatory involvement is "so pervasive as to make reasonable the inference that Congress left no room to supplement it." *Fidelity Federal Savings & Loan Assoc. v. de la Cuesta,* 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982), is not in doubt here. The other type of implied preemption occurs where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc., v. Paul,* 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963) and/or where state law "stands as an obstacle to the accomplishment and execution of the

full purposes and objections of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941). Clearly these standards are met under the facts of this case. If the FCC cannot be free to locate radio stations in response to shifting demographics and the dictates of geology then radio and television broadcasting as we know it might as well cease to exist or at least we must face its greatly reduced availability. This is especially true when a broadcast facility which is far less obtrusive than a pig, chicken, or cattle farm which is allowed in an area zoned agriculture as here. The reluctance of our courts to address zoning issues is an understandable facet of modern life in the United States. But surely there is a First Amendment interest not just for broadcasters, but for all citizens in free and unhampered access to the broadcast spectrum regulated in the common interest under the Commerce Clause. Though the FCC has never asserted their preemptive authority to ignore local zoning powers in the limited area of locating stations, that authority undoubtedly exists. The FCC's failure to fulfill their general Congressional mandate should not allow millions of people to be denied access to, and utilization of, the airwaves. Nature and demographics dictate the optimum location of radio stations. Irrational local actions in the name of property rights or the accidents of a comprehensive zoning plan should not be allowed to prevent the optimum use of the airwaves. This Court should make clear in First Amendment and Commerce Clause terms, that the FCC has a preemptive power and right on behalf of broadcasters' interests but more importantly the general publics' interest, to seek and encourage the most complete use of the broadcast spectrum. To do so the FCC should exclusively site AM radio stations without having to fear interference from local zoning boards.

CONCLUSION

The opinion of the Court of Appeals for the Third Circuit is in violation of the Due Process Clause of the Fourteenth Amendment and is contrary to, *inter alia,* its own decisions in *Bello v. Walker* and *Taylor Invest Ltd. Inc., v. Upper Darby Township* and is also contrary to this Court's holding in *Daniels v. Williams,* and the opinion of the Court of Appeals of the Third Circuit also fails to recognize the need for FCC preemption of local zoning laws in the location of AM radio stations. Petitioners therefore request that this Honorable Court issue a writ of certiorari.

Respectfully submitted,

DON BAILEY
Counsel of Record
Attorney for Petitioners

APPENDIX A — ORDER DENYING REHEARING OF THE UNITED STATES COURT OF APPEALS FILED JUNE 1, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1711 and 93-1712

WVCH COMMUNICATIONS, INC.; THOMAS H. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1711

vs.

UPPER PROVIDENCE TOWNSHIP, et al.,

WVCH COMMUNICATIONS, INC.; THOMAS E. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1712

vs.

WALTER KALIL, et al.,

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,*
BECKER, STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO,
ROTH and LEWIS, *Circuit Judges.*

Appendix A

The petition for rehearing filed by the appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ J. LEWIS
Circuit Judge

Dated: Jun 1 1994

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FILED MAY 4, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1711 and 93-1712

WVCH COMMUNICATIONS, INC.; THOMAS H. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1711

vs.

UPPER PROVIDENCE TOWNSHIP; UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD; RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING GROUP, AND SUE TIEFENTHALER

WVCH COMMUNICATIONS, INC.; THOMAS H. MOFFITT, AND ALICE E. MOFFITT,

Appellants No. 93-1712

vs.

WALTER KALIL; CLAY HESS, INDIVIDUALLY; KALIL PRINTING, INC.; THE SCHOOL BOARD OF THE SPRING-FORD SCHOOL

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Appendix B

(D.C. Civil Nos. 92-05755 and 93-02225)
District Judge:Honorable Ronald L. Buckwalter

ARGUED MARCH 7, 1994

BEFORE: MANSMANN, LEWIS and SEITZ, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on July 16, 1993, be and is hereby AFFIRMED.

Costs taxed against the appellants.

BY THE COURT:
s/ J. Lewis
Circuit Judge

Attest:

s/ P. Douglas Sisk
Clerk
Date. MAY 4 1994

APPENDIX C — UNITED STATES DISTRICT COURT MEMORANDUM AND ORDER FILED JULY 15, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 93-CV-2225

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

WALTER KALIL, CLAY HESS, INDIVIDUALLY; KALIL PRINTING INC., AND THE SCHOOL BOARD OF THE SPRING-FORD SCHOOL DISTRICT,

Defendants.

MEMORANDUM

BUCKWALTER, J. July 15, 1993

I. Introduction

In two separate motions, all defendants have moved to dismiss this complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. For the following reasons, the motion is GRANTED.

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II. Facts

The background facts of this case have previously been reported in a memorandum and order granting in part and denying in part defendants' motion to dismiss in a related case, *WVCH Communications, Inc., et. al, v. Upper Providence Township, et. al,* Civil Action No. 92-CV-5755, dated December 23, 1992. ("The December 23 Memorandum")[1] Plaintiffs Thomas H. and Alice E.

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1. The facts from the December 23 memorandum read as follows:

Plaintiffs Thomas H. and Alice E. Moffit (hereinafter collectively "Moffit") own WVCH, a for-profit, religion-oriented, AM radio station. WVCH is also a named plaintiff. The Moffits purchased a parcel of land in Upper Providence Township (the "Township") in order to expand and relocate WVCH. This parcel is zoned Residential/Agricultural, and thus Moffit could not put WVCH on that parcel without some change in the zoning. Accordingly, Moffit filed an application with the Upper Providence Township Zoning Hearing Board (the "Zoning Board") challenging the Upper Providence Zoning Ordinance (the "zoning ordinance") on the basis that it unconstitutionally excluded radio broadcast facilities from the Township. Various parties opposed this application, including defendants Rhone-Poulenc Rorer ("Rorer"). Sterling Research Group ("Sterling") and Susan Tiefenthaler, the leader of CART (Citizens Against Radio Towers) and also allegedly a Republican Committeewoman. Rorer and Sterling are both pharmaceutical companies.

In accordance with the application, a formal series of hearings began before the Zoning Board on September 19, 1989. Plaintiffs allege that the Zoning Board never intended to give them a fair hearing, and that the hearings were dragged out merely to harass and discourage them. No decision was handed down until October 2, 1992, the same day plaintiffs filed their complaint.

One of the issues in these hearings was radio frequency interference ("RFI"). Moffit alleges that the Zoning Board knew that consideration of RFI was preempted by federal law. This was a method by which opposition to the application, allegedly with the acquiescence of the Zoning Board, attempted to "extend the hearings an harass plaintiffs into submission."

(Cont'd)

Moffit (hereinafter collectively "Moffit") subsequently brought this action against Walter Kalil and Clay Hess, members of the Zoning Hearing Board, Kalil Printing, which is owned by Walter Kalil, and the School Board of the Spring-Ford School District ("School Board") as defendants.

In this action, plaintiffs allege that defendants Kalil and Kalil Printing desired to do business with Rorer. Thus, when Rorer opposed plaintiffs' zoning application, Kalil "knew he could not afford to vote against Rorer ... without running the risk of offending a strongly wished-for customer." Complaint, ¶ 22. Plaintiffs also allege that Clay Hess' brother is affiliated with the law firm which represented Rorer before the Zoning Board in the WVCH matter. Accordingly, Clay Hess "could not avoid being influenced by his brother's association with the ... law firm." Complaint, ¶ 27. Furthermore, Hess "had (and still has) a continuing interest in the success of Walter Kalil and Kalil Printing consisting of Hess' need to protect his investment in Kalil Printing[2] and to protect his political alliance with Walter Kalil." Complaint,

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(Cont'd)

Additionally, Moffit was allegedly approached by Rorer's counsel and told that he (Moffit) did not have the time or money to oppose Rorer and Sterling. Moffit also alleges that the drug companies and the Township have financially supported CART's (and Tiefenthaler's) opposition. To this end, Moffit was told by an "unknown Catholic priest" that the real reason the drug companies were opposing him was because Rorer is the manufacturer of RU-486, popularly known as the "abortion pill," and they didn't want WVCH nearby, since Moffit's views on abortion are "pro-life." Furthermore, the chairman of the Zoning Board, Clay Hess, allegedly told one of Moffit's assistants that the Zoning Board had "to protect Rorer... Rorer is going to give us a multimillion dollar tax base... we can't give up that tax base just for this little station."

2. According to the Complaint, Hess gave Kalil $35,000 to help start this business. Complaint, ¶ 13.

Appendix C

¶ 26. Finally, plaintiffs allege that the School Board did business with Kalil Printing, and that had something to do with its opposition to WVCH.

This complaint contains four counts: a § 1983 action (Count I) based on violations of the First, Fifth and Fourteenth Amendments, a count for punitive damages (Count II), a state count for civil conspiracy (Count III) and a count for violation of the Pennsylvania Constitution (Count IV).

III. Discussion

A. Standard of Review

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rocks v. Philadelphia*, 868 F. 2d 644 , 645 (3d Cir. 1989) . All well-pleaded factual allegations in the complaint must be taken as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Rocks*, 868 F. 2d at 645. The court must draw all reasonable inferences from the allegations and view them in the light most favorable to the non-moving party. *Rocks*, 868 F.2d at 645.

B. Effect of Motion to Dismiss in Related Case

Several issues raised by defendants in these motions to dismiss are identical to those resolved in the December 23 memorandum granting in part and denying in part defendants' motion to dismiss. Where appropriate, I have adopted by reference those parts of the December 23 memorandum which apply here.

Appendix C

C. Plaintiffs' § 1983 Claim

Plaintiffs have alleged violations of three distinct constitutional rights: substantive due process, the first amendment and unconstitutional taking without just compensation. Each of these will be treated separately.[3]

1. Substantive Due Process

Defendants disagree with the December 23 memorandum insofar as it denied the motion to dismiss with respect to the substantive due process claim. That section of the opinion with which defendants disagree reads as follows:

> Defendants have also argued that the complaint fails to allege the requisite entitlement to state a claim for substantive due process. They state that "plaintiffs did not and cannot allege that the Township's zoning ordinance unequivocally authorized construction of their proposed radio station." This argument ignores the substantive due process jurisprudence from this Circuit. As stated in the main text of this opinion, "the deliberate and arbitrary use of government power violates an individual's right to substantive due process." *Bello v.*

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3. Defendants have moved to dismiss the complaints' allegations of an equal protection violation and a procedural due process violation; however, plaintiffs claim that they did not plead either. I will dismiss the equal protection count and the procedural due process count, if they are present, since plaintiffs have indicated their desire not pursue them. See Plaintiffs' Memorandum of Law in Opposition to the Motion of Defendants Kalil, Hess, and Kalil Printing Seeking Abstention or Dismissal at 3, 7.

> *Walker,* 840 F.2d [1124] at 1129 [3d Cir. 1988]. There is no inquiry as to whether the protected property interest is in the land the plaintiff owns and is seeking to use or in the permit he requires for his intended use. It is true that other courts have made this inquiry. *See, e.g., RRI Realty Corp. v. Village of Southampton,* 870 F.2d 911, 917-18 (2d Cir.), *cert. denied,* 493 U.S. 893 (1989), cited by defendants; (Test for whether a landowner has a legitimate claim of entitlement is whether "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.") However, that is not the rule of this Circuit, as *RRI Realty* itself makes clear. *Id.* at 916 (reviewing cases).

Subsequent to the issuance of the December 23 memorandum, the Third Circuit Court of Appeals stated that "to prevail on a *substantive* due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of *a protected property interest.*" *Taylor Invest., Ltd., v. Upper Darby Township,* 983 F.2d 1285, 1290 (3d Cir. 1993) (emphasis added). That decision, together with my re-evaluation of other cases including *Bello,* lead me to conclude that defendants are correct in asserting that plaintiffs must show a protected property interest before being able to state a substantive due process claim. Plaintiffs have made no such showing, and indeed, cannot do so unless and until it is proven that they are entitled to the zoning variance which they sought, an issue currently pending in the state court.[4] Plaintiffs contend that

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4. Plaintiffs allege in the complaint that they have a "1st Amendment liberty interest" in their FCC license to begin construction and commence broadcasting. Complaint. ¶ 70-71.

the unreasonable delay in deciding their application is the basis for their substantive due process violation. While defendants' alleged actions, if proven, would seem to be a clear example of "deliberate and arbitrary abuse of government power," *Bello*, 840 F.2d at 1129, under the law of this circuit it does not state a substantive due process claim unless accompanied by a protected property interest. Therefore, I dismiss plaintiffs' 1983 count insofar as it is based on substantive due process.

2. First Amendment

For the reasons discussed in the December 23 memorandum, plaintiffs' 1983 claim, insofar as it based on first amendment considerations, is dismissed.

3. Taking Without Just Compensation

Defendants argue that plaintiffs have failed to allege any facts which meet the standards for stating a valid takings claims.[5] I agree. Once again, I point out that this lawsuit does not challenge the constitutionality of the zoning ordinance: it is a request for damages for the delay in rendering a decision. Therefore, it is this temporary delay only which can be considered the basis for plaintiff's takings claim.

Viewed this way, plaintiffs do not state a takings claim. There may be, at best, a diminution in value of plaintiffs' property for that part of the delay in deciding the Moffits' application which was unreasonable. First of all, normal delays in obtaining building

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5. The Fifth Amendment, applicable throught the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."

permits, changes in zoning ordinances, etc. are not takings. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321, 107 S.Ct. 2378, 2389 (1987). More importantly, a taking does not result merely because a plaintiff has been denied the best use or uses of his property; a plaintiff must be deprived of all economically viable uses of the property. *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir.), *cert. denied*, 482 U.S. 906, 107 S.Ct. 2482, *reh. den.* 483 U.S. 1040 (1987), *citing Goldblatt v. Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 988 (1962). Plaintiffs do not allege that they have been deprived of all economically viable uses of the property. Accordingly, plaintiffs' 1983 claim, insofar as it is based on a takings claim, is dismissed.

D. Judicial Immunity and Abstention

Defendants Kalil and Hess argue that they are entitled to absolute judicial immunity, and that this court should abstain from the instant action by applying the *Pullman* doctrine. *See Railroad Com. of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643 (1941). Due to the disposition of the case on other grounds, it is unnecessary to decide these aspects of defendants' motions.

E. Counts III and IV

Counts III and IV of plaintiffs' complaint are pendent state claims for civil conspiracy and violation of the Pennsylvania Constitution. Now that the federal counts have been dismissed, plaintiff's basis for federal jurisdiction no longer exists, thereby warranting the dismissal of plaintiff's pendent state claims. *See Markowitz v. Northeast Land Co.*, 906 F.2d 100, 106 (3d Cir. 1990) (stating that "the rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court.")

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IV. Conclusion

For the foregoing reasons, defendants' motion to dismiss the complaint is GRANTED.

An order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-5755

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER, PHARMACEUTICAL INC., STERLING RESEARCH GROUP, AND SUE TIEFENHALER,

Defendants.

ORDER

AND NOW, this 15th day of July, 1993 f or the reasons set forth in this court's memorandum and opinion in the related case of *WVCH Communications, Inc., et. al v. Kalil. et. al,* Civil Action No. 93-CV-2225, it is ORDERED THAT the order granting in part and denying in part defendants' motion to dismiss dated December 23, 1992, is VACATED to the extent that it denied defendants' motion to dismiss the substantive due process count, and defendants' motion to dismiss the substantive due process count is GRANTED.

IT IS SO ORDERED.

BY THE COURT:
s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-2225

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

WALTER KALIL, CLAY HESS, INDIVIDUALLY; KALIL PRINTING INC., AND THE SCHOOL BOARD OF THE SPRING-FORD SCHOOL DISTRICT,

Defendants.

ORDER

AND NOW, this 15th day of July, 1993, upon consideration of Defendants' motion to dismiss, it is hereby ORDERED that the motion is GRANTED.

IT IS SO ORDERED.

BY THE COURT:
s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

APPENDIX D — UNITED STATES DISTRICT COURT MEMORANDUM AND ORDER FILED DECEMBER 23, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-5755

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP, ZONING HEARING BOARD, RHONE-POULENC RORER, PHARMACEUTICAL INC., STERLING RESEARCH GROUP, AND SUE TIEFENTHALER,

Defendants.

MEMORANDUM

BUCKWALTER, J. December 23, 1992

I. *Introduction*

Defendants have moved to dismiss this complaint pursuant to Fed. R. Civ. P.12(b)(6) for failure to state a claim upon which relief can be granted. For the following reasons, the motion is granted in part and denied in part.

II. *Facts*

Plaintiffs Thomas H. and Alice E. Moffit (hereinafter

collectively "Moffit") own WVCH, a for-profit, religion-oriented, AM radio station.[1] WVCH is also a named plaintiff. The Moffits purchased a parcel of land in Upper Providence Township (the "Township") in order to expand and relocate WVCH. This parcel is zoned Residential/Agricultural, and thus Moffit could not put WVCH on that parcel without some change in the zoning. Accordingly, Moffit filed an application with the Upper Providence Township Zoning Hearing Board (the "Zoning Board") challenging the Upper Providence Zoning Ordinance (the "zoning ordinance") on the basis that it unconstitutionally excluded radio broadcast facilities from the Township. Various parties opposed this application, including defendants Rhone-Poulenc Rorer ("Rorer"), Sterling Research Group ("Sterling") and Susan Tiefenthaler, the leader of CART (Citizens Against Radio Towers) and also allegedly a Republican Committeewoman. Rorer and Sterling are both pharmaceutical companies.

In accordance with the application, a formal series of hearings began before the Zoning Board on September 19, 1989. Plaintiffs allege that the Zoning Board never intended to give them a fair hearing, and that the hearings were dragged out merely to harass and discourage them. No decision was handed down until October 2, 1992, the same day plaintiffs filed their complaint.

One of the issues in these hearings was radio frequency interference ("RFI"). Moffit alleges that the Zoning Board knew that consideration of RFI was preempted by federal law. This was a method by which opposition to the application, allegedly with the acquiescence of the Zoning Board, attempted to "extend the hearings and harass plaintiffs into submission."

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1. The factual narrative is taken from the complaint.

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Additionally, Moffit was allegedly approached by Rorer's counsel and told that he (Moffit) did not have the time or money to oppose Rorer and Sterling. Moffit also alleges that the drug companies and the Township have financially supported CART's (and Tiefenthaler's) opposition. To this end, Moffit was told by an "unknown Catholic Priest" that the real reason the drug companies were opposing him was because Rorer is the manufacturer of RU-486, popularly known as the "abortion pill," and they didn't want WVCH nearby, since Moffit's views on abortion are "pro-life." Furthermore, the chairman of the Zoning Board, Clay Hess, allegedly told one of Moffit's assistants that the Zoning Board had "to protect Rorer . . . Rorer is going to give us a multimillion dollar tax base . . . we can't give up that tax base just for this little station."

Plaintiffs' complaint consists of four counts. Count I is a request for injunctive and declaratory relief, asking that the court require the Zoning Board to act favorably upon plaintiffs' application, and declare that RFI is a federally preempted matter. Counts II, III and IV are requests for damages resulting from the delay in the proceedings, plus punitive damages and attorneys' fees, pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, and state law civil conspiracy.

It is important to note exactly what the plaintiffs are challenging, and the relief they are requesting. The complaint was filed before the Zoning Board issued a ruling, therefore their decision is not at issue. Plaintiffs' § 1983 claim clearly requests damages resulting from the delay in deciding on Moffit's application. Most importantly, however, Moffit is not challenging the constitutionality of the zoning ordinance itself. Plaintiffs did not provide a copy of the ordinance or the reasons why they believe it is unconstitutional. In plaintiffs' memorandum in support of

their motion for injunctive and declaratory relief, Moffit concedes that he is not challenging state law but is "challenging the actions of public officials with respect to that law." Therefore, the allegations go to the conduct of the Zoning Board only, and the motion to dismiss is analyzed accordingly.

III. *Discussion*

A. *Standard of Review*

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). All well-pleaded factual allegations in the complaint must be taken as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Rocks*, 868 F.2d at 645. The court must draw all reasonable inferences from the allegations and view them in the light most favorable to the non-moving party. *Rocks*, 868 F.2d at 645.

B. *Plaintiffs' § 1983 Claim*

An actionable section 1983 claim must allege facts sufficient to support a determination that "(i) that the conduct complained of has been committed under color of state law, and (ii) that [the alleged] conduct worked a denial of rights secured by the Constitution or laws of the United States." *Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3d Cir.), *cert. denied*, *In re Abdul-Akbar*, 111 S. Ct. 237 (1990), citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

Plaintiffs have alleged violations of four distinct constitutional rights: procedural due process, substantive due

process, first amendment and equal protection. Each of these will be treated separately.

1. *Procedural Due Process*

In order to state a claim for a violation of procedural due process, plaintiffs must allege that the state has not provided a meaningful post-deprivation remedy. *See Parratt v. Taylor*, 451 U.S. 527 (1981);[2] *Hudson v. Palmer*, 468 U.S. 517 (1984) ("[T]he Due Process Clause of the Fourteenth Amendment is not violated when a state employee negligently [or intentionally] deprives an individual of property, provided that the state makes available a meaningful post-deprivation remedy.") *See also Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990) ("The constitutional violation actionable under § 1983 is not complete when the deprivation occurs: it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate.") The Third Circuit has held that Pennsylvania's procedures for challenging zoning ordinances substantially conformed with the due process guidelines enunciated by the Supreme Court. *Rogin v. Bensalem Township*, 616 F.2d 680, 695 (3d Cir. 1980), *cert. denied, Mark-Garner Associates, Inc. v. Bensalem Township*, 450 U.S. 1029 (1981). Indeed, plaintiffs have already appealed to the Montgomery County Court of Common Pleas.

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2. One aspect of the holding of *Parratt v. Taylor* was that a plaintiff could be deprived of due process by a negligent act of an official. In *Daniels v. Williams*, 474 U.S. 327, 328 (1986), the Court overruled this aspect of *Parratt* and held that the Due Process Clause is not implicated by a negligent act of an official causing unintended loss of life, liberty, or property. This aspect of the *Parratt* holding is not relevant to this case, since plaintiffs here have not alleged a negligent act but an intentional one.

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Neither can the allegedly unreasonable, intentional delay support a procedural due process claim. *See Midnight Sessions, Ltd. v. Philadelphia*, 945 F.2d 667, 682 (3d Cir.), *reh. en banc den.*, 1991 U.S. App. LEXIS 25, 678 (1991), *cert. denied*, 112 S. Ct. 1668 (1992), citing *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir,), *cert. denied*, 488 U.S. 851, *cert. denied*, 488 U.S. 868 (1988).

Plaintiffs urge this court to follow the example of *C & M Group, Inc. v. New Britain Township*, 1991 U.S. Dist. LEXIS 2239 (E.D. Pa. 1991). In that case Judge Gawthrop distinguished *Parratt v. Taylor* in the zoning context, noting that the *Parratt* Court had held that post-deprivation remedies were adequate to satisfy due process "only when the circumstances surrounding the deprivation require quick action by the state, or when pre-deprivation procedures are impractical . . . Neither exists in the context of zoning review."

Nevertheless, Judge Gawthrop dismissed the procedural due process count, because the plaintiff's complaint that the Zoning Board acted arbitrarily went to substance rather than procedure, and because plaintiff failed to allege "what procedures or procedural mechanisms were in fact required by the Constitution and were in fact denied."

The case at bar does not state a case for procedural due process even under C & M Group, since this case too involves allegations going to substance rather than procedure. Moffit has not alleged that the zoning process itself was constitutionally defective or that necessary procedures were not provided, but only that the actions of defendants violated his rights.

For these reasons, plaintiffs' procedural due process claim must be dismissed.

Appendix D

2. *Substantive Due Process*

Plaintiffs claim that the Zoning Board's delay in making a decison constituted a substantive due process violation. The touchstone of a substantive due process violation is "the deliberate and arbitrary abuse of government power." *Bello v. Walker,* 840 F.2d at 1129. In that case, plaintiffs alleged that municipal officials had violated their right to substantive due process by denying them a building permit. The Court of Appeals reversed the district court's grant of summary judgment to defendants on that count, stating that:

> The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. (Footnote omitted.) These accusations can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

Id. at 1129-30.[3]

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3. Defendants have also argued that the complaint fails to allege the requisite entitlement to state a claim for substantive due process. They state that "plaintiffs did not and cannot allege that the Township's zoning ordinance unequivocally authorized construction of their proposed radio station." This argument ignores the

(Cont'd)

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Allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiffs' application, may support a finding of a substantive due process violation. *Midnight Sessions, Ltd.*, 945 F.2d at 667, *citing Bello*, 840 F.2d at 1129. Furthermore, while the state may consider community sentiment in evaluating applications for licenses if community objection is based on "legitimate state interests," a government's determinations predicated on "the public's negative attitudes or biases, unfounded fears or speculation, prejudice, self-interest or ignorance is arbitrary and irrational action." *Id.* at 685.

The case presents allegations similar to *Bello v. Walker*. If the Zoning Board acted (or delayed acting) for political reasons or

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(Cont'd)
substantive due process jurisprudence from this Circuit. As stated in the main text of this opinion "the deliberate and arbitrary use of government power violates an individual's right to substantive due process." *Bello v. Walker*, 840 F.2d at 1129. There is no inquiry as to whether the protected property interest is in the land the plaintiff owns and is seeking to use or in the permit he requires for his intended use. It is true that other courts have made this inquiry. *See, e.g., RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 917-18 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989), cited by defendants; (Test for whether a landowner has a legitimate claim of entitlement is whether "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.") However, that is not the rule of this Circuit, as *RRI Realty* itself makes clear. *Id.* at 916 (reviewing cases).

Since it has been dismissed on other grounds, it is not necessary to decide whether defendants' arguments regarding plaintiffs' lack of an entitlement would apply in the procedural due process context. However, the court in *Midnight Sessions* describes a property interest as existing when a party satisfies all the *objective* criteria for approval of its plan. *Midnight Sessions*, 945 F.2d at 679.

other impermissible reasons, as enumerated above, then plaintiffs have a valid substantive due process claim. Plaintiffs should be given a chance to prove their allegations. Thus, plaintiffs' substantive due process claim may not be dismissed.

3. *First Amendment*

Plaintiffs claim that there has been an unreasonable restriction placed upon their freedom of speech and their religious freedom. They claim that WVCH "has a right as a matter of religious freedom to reach a new and larger audience if the FCC approves as they have." They also claim that they have "a right to broadcast at the Upper Providence Township location." From these statements, it is apparent that plaintiffs are not seeking redress for past first amendment violations but are seeking relief from enforcement of the zoning ordinance. Their complaint does not reflect that; it challenges the conduct of the Zoning Board. Therefore, plaintiff's first amendment count must be dismissed.

4. *Equal Protection*

Plaintiffs have also alleged a violation of equal protection. However, defendants have not addressed equal protection in their motion to dismiss or accompanying memorandum. Thus, the equal protection count is not dismissed. Defendants may move to dismiss this count in a separate motion, fully briefed, within twenty days of issuance of this opinion.

C. *Injunctive Relief*

Plaintiffs do not meet the requirements for injunctive relief. In order to be entitled to a preliminary injunction, the moving party must show: (1) a reasonable probability of eventual success in the

litigation, and (2) irreparable injury pendente lite if relief is not granted. The court should also take into account, when these are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *In Re Arthur Treacher's Franchisee Litigation*, 689 F.2d 1137, 1143 (3d Cir. 1982). Plaintiffs alleged that "[t]he damages and harm plaintiffs are suffering now is continuing and is irreparable since plaintiffs are losing business, suffering an irreplaceable right to communicate their beliefs, and their right to provide access under the 1st Amendment for the communication of their clients' religious beliefs and that these losses cannot be replaced by mere money damages." Complaint, ¶ 88.

Again, since plaintiffs concede that they are not challenging state law, it is unclear what injunctive relief they believe they are entitled to considering the "probability of eventual success." If they wish to avoid application of the zoning law and be permitted to construct their radio station, they should have challenged the zoning ordinance. The only relief plaintiffs may be entitled to based on their complaint is damages resulting from the unreasonable delay. Accordingly, plaintiff's request for injunctive relief is denied.

D. Declaratory Relief

Plaintiffs' claim for declaratory relief must be dismissed because there is no live dispute between the parties on the issue. Plaintiffs contend that defendants dragged out the hearings on its zoning application for three years, largely because of the issue of radio frequency interference, or RFI, despite the fact that it is preempted from local consideration as a matter of federal law. Plaintiffs may raise this as part of its case against defendants for deprivation of due process in unreasonably delaying a decision.

However, since the Zoning Board's decision is not at issue, and since that decision did not mention RFI anyway, the issis not "live" for purposes of making declaratory relief appropriate.

E. *Sterling and Tiefenthaler*

Defendant Sterling has filed a supplemental memorandum in support of defendants' motion to dismiss. Sterling argues that plaintiffs' allegations concerning it, even if true, amount to nothing more than "appropriate participation in the zoning process by a concerned neighbor." Defendant Tiefenthaler has similarly filed a supplemental memorandum. Essentially, the allegations against these defendants are that they entered into an "unlawful agreement" with the Zoning Board to influence the outcome of the proceedings.

A private actor who conspires with a state actor to deprive another of his rights may be found to have acted under color of state law. *See Dennis v. Sparks,* 449 U.S. 24 (1980); *Adickes v.S.H. Kress Co.,* 398 U.S. 144 (1970). Plaintiffs have alleged sufficient evidence of conspiracy with a state actor to survive this motion to dismiss. Tiefenthaler's motion and exhibits are better suited to a motion for summary judgment, since at this time allegations in the complaint are taken as true.

V. *Conclusion*

Plaintiffs may pursue their § 1983 claim, based on an alleged substantive due process and/or equal protection violation, their § 1988 claim, and their civil conspiracy claim against all defendants. Count I, requesting injunctive and declaratory relief is dismissed.

An order follows.

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 92-CV-5755

WVCH COMMUNICATIONS, INC., THOMAS H. MOFFIT AND ALICE E. MOFFIT,

Plaintiffs,

v.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP, ZONING HEARING BOARD, RHONE-POULENC RORER, PHARMACEUTICAL INC., STERLING RESEARCH GROUP, AND SUE TIEFENTHALER,

Defendants.

ORDER

AND NOW, this 23rd day of December, 1992, upon consideration of defendants' motion to dismiss, it is hereby ORDERED that the motion is GRANTED in part and DENIED in part. Count I, for injunctive and declaratory relief, is DISMISSED. Counts II and III are DISMISSED only to the extend they are based on procedural due process and first amendment considerations.

BY THE COURT
s/ Ronald L. Buckwalter,
RONALD L. BUCKWALTER, J.

ENTERED: 12/23/92
CLERK OF COURT

(2)
FILED
AUG 25 1994
OFFICE OF THE CLERK

No. 94-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WVCH, COMMUNICATIONS, INC.; THOMAS H. MOFFIT and ALICE E. MOFFIT,

Petitioners,

vs.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING RESEARCH GROUP; SUE TIEFENTHALER, WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE ZONING HEARING BOARD, WALTER KALIL, CLAY HESS AND KALIL PRINTING, INC.

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NO. 94-225

IN THE
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October Term, 1994

WVCH, COMMUNICATIONS, INC.; THOMAS H. MOFFIT and ALICE E. MOFFIT,

Petitioners,

vs.

UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE TOWNSHIP ZONING HEARING BOARD, RHONE-POULENC RORER PHARMACEUTICAL, INC.; STERLING RESEARCH GROUP; SUE TIEFENTHALER, WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS UPPER PROVIDENCE TOWNSHIP, UPPER PROVIDENCE ZONING HEARING BOARD, WALTER KALIL, CLAY HESS AND KALIL PRINTING, INC.

ISSUE FOR REVIEW

Whether the court of appeals properly affirmed the dismissal of these consolidated cases by the district court for failure of petitioners to claim or prove the existence of a protected property interest upon which to base their substantive due process claim?

RELATED PROCEEDING

Petitioners' appeal from the determination of the Zoning Hearing Board, whose manner of conducting the hearings they allege as a basis for the actions here appealed, is currently pending before the Court of Common Pleas of Montgomery County, Pennsylvania, sub nom Appeal of Thomas H. Moffit and Alice C. Moffit from the decision of the Upper Providence Township Zoning Hearing Board, No. 92-21993.

STATEMENT OF JURISDICTION

This Honorable Supreme Court has jurisdiction of the instant petition and brief in opposition thereto pursuant to 28 U.S.C. Section 1256.

IMPROPER INCLUSION OF CONSTITUTIONAL PROVISION

Petitioners have incorrectly included the First Amendment in their citation of constitutional provisions involved here. While their complaints included causes of action based on the First Amendment, the district court dismissed these causes of action, which were never appealed.

COUNTERSTATEMENT OF THE CASE

The instant petition has been made by plaintiffs below who seek to appeal the affirmance of the Third Circuit Court of Appeals of the dismissal of two consolidated cases brought pursuant to 42 U.S.C. §1983. The cases grew out of the

petitioners' dissatisfaction with zoning hearing board proceedings, the resulting decision of which is currently on appeal to the Court of Common Pleas of Montgomery County, Pennsylvania. The lower court granted defendants' motion to dismiss for failure of plaintiffs to state any viable causes of action. Plaintiffs appeal the dismissal of their claims for violation of their substantive due process rights and for injunctive and declaratory relief. They have not at any time in these actions challenged the ruling of defendant Zoning Hearing Board.

Procedure.

On October 5, 1992, petitioners filed the first of these two actions, No. 92-cv-5755, in the U.S. District Court for the Eastern District of Pennsylvania, purporting to state claims against the answering respondents Zoning Hearing

Board of Lower Providence Township and the Township, Rhone-Poulenc Rorer Pharmaceutical, Inc., the Sterling Research Group and Sue Tiefenthaler for alleged deprivation of petitioners' First, Fifth and Fourteenth Amendment rights and for civil conspiracy by the defendants to accomplish this deprivation. Petitioners sought injunctive and declaratory relief, compensatory and punitive damages and attorneys fees and costs.

Petitioners directed their allegations chiefly at the manner in which proceedings on their application to challenge the local zoning ordinance were conducted by the defendant Zoning Hearing Board, which denied their application on October 2, 1992 after a lengthy series of hearings. In connection with their request for equitable relief, petitioners

alleged that federal law preempted "RFI" (Radio Frequency Interference) considerations by the Board, which had not based its decision on them.

Defendant/respondents in the first case filed a motion to dismiss the complaint and opposed petitioners' request for declaratory and injunctive relief. The trial court, by orders dated December 23, 1992 and February 12, 1993, dismissed all of petitioners' claims except for violation of their substantive due process rights. The court noted that petitioners failed to state any valid basis for equitable relief.

The court also noted that petitioners were not asking it to review the decision of the Zoning Hearing Board. Nonetheless, it allowed petitioners to maintain their substantive due process

claim for respondents' alleged "unreasonably delaying a decision."

On April 27, 1993, petitioners instituted the second of these cases, No. 93-cv-2225, against answering respondents Walter Kalil and Clay Hess, members of the Zoning Hearing Board, in their personal capacities, as well as Mr. Kalil's business and the local school district. The complaint purported to state the same claims as in the first action, except the equitable claims, and added a pendent claim for violation of state constitutional rights. As before, petitioners' allegations focused solely upon the conduct of the Board's hearings. Id.

Respondents in the second case subsequently sought the dismissal of the complaint or, alternatively, that the trial court abstain.

By order dated July 18, 1993, the district court dismissed the complaints in both cases. Key to the court's decision was its ruling that, in accordance with the precedents of this Honorable Supreme Court and the Third Circuit, no claim for deprivation of substantive due process rights can lie unless a plaintiff demonstrates that it has been deprived of a protected property interest, which petitioners have not done. The district court did not reach the issue of judicial immunity as to defendants Kalil and Hess.

The Third Circuit Court of Appeals affirmed the dismissal order of the district court by judgment order dated July 16, 1993 and denied petitioners' petition for rehearing by order dated June 1, 1994.

Facts.

Petitioners, seeking to relocate and expand their radio station, purchased property in respondent Township knowing that it was not properly zoned for this purpose. In an attempt to alter the ordinance to suit their ends, petitioners challenged its constitutionality, maintaining that it excludes radio stations from the Township. Petitioners' challenge to the ordinance generated opposition by the Township and a wide variety of its citizens, including defendant corporations Rhone-Poulenc Rorer Pharmaceutical, Inc. and Sterling Research Group, who opposed the proposed location of petitioners' radio tower on extensive legal and scientific grounds. Petitioners and their supporters contested these grounds. The resultant series of hearings, allowing for the

presentation of inter alia extensive expert evidence and rebuttal, lasted from September 21, 1989 to August 20, 1992. Although petitioners resorted to the Pennsylvania trial court to resolve a discovery dispute related to the hearings, they never sought an injunction to curtail the proceedings they now portray as unduly extended.

The proceedings culminated in the October 2, 1992 opinion of the Zoning Hearing Board, in which the Board determined that the zoning ordinance was constitutionally valid and denied petitioners' application for relief from it. Because of its analysis of the constitutionality of the zoning ordinance, the Board did not reach issues such as "RFI" (Radio Frequency Interference), upon which petitioners base their claim for declaratory relief.

Plaintiffs' appeal from the determination of the Zoning Hearing Board is currently pending before the Court of Common Pleas of Montgomery County, at No. 92-21993. The appeal sets forth as a basis for reversal of the Board's order the same wrongdoing -- intentional delay of proceedings and bias -- that plaintiffs allege in the actions that are the subject of the instant petition.

ARGUMENT

1. **The Lower Courts Correctly Determined That Plaintiffs Had Failed To State A Claim For Violation Of Their Substantive Due Process Rights.**

Plaintiffs, unable to demonstrate that they have been deprived of a property interest by defendants, nonetheless argue that their substantive due process protection against such a deprivation has been violated. This

position is illogical, contrary to law and devoid of merit.

Furthermore, petitioners abandoned their procedural due process claims below, despite the fact that their claims are quite plainly based upon objections to procedural rulings by the Upper Providence Zoning Hearing Board.

The principle that due process concerns arise only in relation to the deprivation of protected rights is rooted in the language of the Constitution. The Fourteenth Amendment provides pertinently that no state shall "deprive any person of life, liberty or property, without due process of law..." This language echoes the Fifth Amendment guarantee against such deprivations by the federal government. Nowhere does the Constitution establish due process protections as independent rights

available to enforce general notions of fairness. Rather, they are derivative and come into play solely when an individual's right to his or her life, liberty or property is at stake.

In accordance with this principle, this Honorable Supreme Court has repeatedly stated that one of the requirements of a valid due process claim is that the plaintiff must have suffered a deprivation of a protected right. Parratt vs. Taylor, 451 U.S. 527, 536-37, 101 Supreme Court 1908, 1912, 68 L.Ed.2d 420 (1981); Board of Regents of State College vs. Roth, 408 U.S. 564, 571, 92 Supreme Court 2701, 2705, 33 L.Ed.2d 548 (1972).

The Third Circuit has also repeatedly articulated this precondition for a due process claim. Taylor Investments, Ltd. vs. Upper Darby

Township, 983 F.2d 1285, 1292 (1993) (plaintiff must demonstrate deprivation of a protected property interest to prevail on substantive due process claim); Unger vs. National Residents Matching Program, 928 F.2d 1392, 1395 (1991) (first inquiry as to alleged Fourteenth Amendment violation is if protected interest in life, liberty or property is implicated), citing Robb vs. City of Philadelphia, 733 F.2d 286, 292 (1984); Winsett vs. McGinnes, 617 F.2d 996, 1004 (1980) (protectable liberty or property interest necessary for substantive and/or procedural due process claims).

The Third Circuit case most relied on by petitioners provides no exception to this rule. In Bello vs. Walker, 840 F.2d 1124 (3rd Cir. 1988) cert. denied, 109 Supreme Court 134, plaintiff

developer stated, inter alia, due process claims based upon the denial of building permits by defendant township; plaintiff's right to said permits had previously been established in the state courts. Id., at 1126.

Instantly, petitioners do not claim they had a protected property interest in the outcome of the Zoning Hearing Board, much less that they were deprived of such an interest. The district court noted that petitioners did not ask it to review the Board's decision, and petitioners' allegations in both complaints address -- and claim damages for -- only delay and bias by the defendants without regard to the result of the hearings. Petitioners thus invoke constitutional protection without establishing any constitutional basis for that protection in the form of deprivation of a property right. Alleged

Alleged unfairness does not suffice to state a constitutional tort.

The deficiency in petitioners' complaints is underlined by their contention that the trial court erred in dismissing their substantive due process cause of action. The thrust of the one substantive due process claim they articulate -- bias on the part of the Zoning Hearing Board -- inevitably rests on proof that the Board erred in its determination. Substantive due process claims go to the fairness of deliberate decisions of government officials. Bello vs. Walker, 840 F.2d 1124, 1128 (3rd Cir. 1988). Petitioners' failure to allege a right in a different outcome and thus obtain a constitutional review of the action of the Zoning Hearing Board is fatal to their claim because it is tantamount to asserting that they need

not be deprived of a protected property interest in order to state a due process claim, in contradiction to Parrat and Taylor, supra.

The remainder of petitioner's due process claims go to the manner in which the hearings were conducted and thus are procedural due process claims. Petitioners have not appealed from the lower court's dismissal of them. No cause of action exists for a substantive due process violation of procedural due process rights. This "piggybacking" of due process rights would in any case fail for lack of a basis in deprivation of life, liberty or property. Furthermore, pre- and post- deprivation considerations have no place in these cases, since petitioners have not established any deprivation of a protected right at all.

It should be noted also that petitioners were not without recourse regarding the alleged improprieties of the defendants. At all times during the course of the hearings, petitioners could have sought injunctive or other equitable relief from the Court of Common Pleas of Montgomery County. Indeed, on at least one occasion, petitioners sought and obtained relief from that court in the form of resolution of a discovery dispute in connection with the hearings before the Zoning Hearing Board. Petitioners were not helpless under state law, as they suggest.

Finally, petitioners purport to make arguments based upon a deprivation of their liberty interest. Not only are such arguments totally unsupported by authority, but they were not made before the circuit court.

Accordingly, answering respondents Kalil, Hess and Kalil Printing, Upper Providence Township and Upper Providence Township Zoning Hearing Board, respectfully request this Honorable Court to deny the instant appeal with prejudice.

2. Respondents Kalil And Hess Are Entitled To Absolute Judicial Immunity.

Respondents Kalil and Hess, who at all relevant times were acting in a quasi-judicial capacity, are entitled to absolute judicial immunity, the immunity afforded individuals performing judicial functions. The fact that they are not judges does not alter this result.

It is the nature of the function performed -- adjudication -- rather than the identity of the actor who performed it, that determines whether absolute immunity attaches to an act. "In order

for quasi-judicial officials to be granted absolute judicial immunity, their acts must reflect the essence of judicial decision-making and involve discretion of a judicial nature." McMillan vs. Svetanoff, 793 F.2d 149, 151 (7th Cir. 1986), cert. denied, 479 U.S. 985, 107 Supreme Ct. 574, 93 L.Ed.2d 577 (1988). (Citations omitted).

The complaints in this action establish that this requirement has been satisfied. The Zoning Hearing Board hearings were adversarial proceedings at which petitioners and other participants presented evidence in testimony. All parties wanted respondents Kalil and Hess to listen to the evidence, review it and render a legal decision on the issues before it. Petitioners sought to have the members of the Board exercise their discretionary authority.

On these facts, "[t]here can be little doubt that the role of the [Zoning Hearing Board members] within this framework is functionally comparable to that of a judge." Butz vs. Economou, 438 U.S. 478, 480, 98 Supreme Ct. 2894, 2914, 57 L.Ed.2d 895 (1978). Petitioners wanted the Board members to engage in acts usually performed by a judge and dealt with the Board members in their judicial capacity. Therefore, absolute judicial immunity applies to the acts of these Board members. Stump vs. Sparkman, 435 U.S. 349, 98 Supreme Ct. 1099, 55 L.Ed. 331 (1978).

Accordingly, respondents Kalil and Hess respectfully request this Honorable Court to deny the instant appeal with prejudice.

3. The Lower Courts Correctly Determined That Petitioners Failed To State A Claim For Injunctive Or Declaratory Relief.

Petitioners contend that the trial court erred in dismissing their purported claims for declaratory and injunctive relief, stated against inter alia the respondent township in the first action, which are based upon the alleged pre-emption of the RFI (radio frequency interference) issue by federal law. Their position has no merit whatever.

The trial court correctly based its dismissal of these claims upon the non-existence of any "live dispute" between the parties, since petitioners did not seek any ruling or claim any protected property interest in the determination of the Zoning Hearing Board.

Furthermore, a plaintiff seeking injunctive relief must demonstrate a "real immediate" threat of injury to

fulfill the case and controversy requirement of Article III of the Constitution. The injury may not be merely abstract, conjectural or hypothetical. Id. Moreover, "'[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...if unaccompanied by any continuing, present adverse affects,'" Id., quoting O-Shea vs. Littleton, 414 U.S. 488, 94 Supreme Ct. 669, at 674, 38 L.Ed. 2d 674 (1974).

Equally to the point, petitioners cannot state claims for injunctive and declaratory relief because the RFI issue was never a basis for the decision of the Zoning Hearing Board. Even if plaintiffs had made an issue of the Zoning Hearing Board decision, therefore, their claims for declaratory and injunctive relief

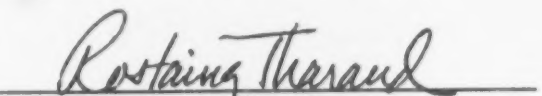
would still not address a case or controversy under Article III.

Accordingly, answering respondents respectfully request this Honorable Court to deny this appeal with prejudice.

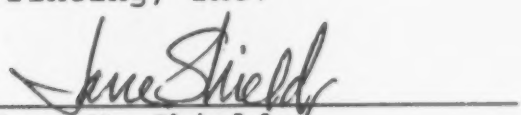
CONCLUSION

For all the above reasons, answering respondents respectfully request this Honorable Supreme Court to deny the instant petition for certiorari.

Respectfully submitted,



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Board

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Respondents,

-and-

WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT

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QUESTIONS PRESENTED

1. Does a litigant set forth a substantive due process claim based upon alleged procedural infirmities of a Zoning Hearing Board when review of a Zoning Hearing Board decision is currently pending in state court?

2. Is a Zoning Hearing Board pre-empted by Federal law from considering the extent to which local residents could be harmed by the electromagnetic radio waves emanating from a litigant's proposed radio tower?

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No. 94-225

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-and-

WALTER KALIL, CLAY HESS, Individually; KALIL PRINTING, INC. and THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE SCHOOL BOARD OF THE SPRING FORD SCHOOL DISTRICT

The Respondent, Spring Ford School District, by and through its attorneys, Frederick C. Horn, Esquire, for Pearlstine/Salkin Associates, respectfully requests that the Writ of Certiorari requested by Petitioners be denied.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 4, 1994. The Order of the United States Court of Appeals for the Third Circuit denying Petitioners' request for rehearing was entered on June 1, 1994. The jurisdiction of the Supreme Court is allegedly based upon Rule 10 of the Supreme Court Rules providing for judicial discretion with regard to a review on Writ of Certiorari. Nonetheless, it is respectfully submitted that the present case does not present an important question of Federal law which has not been settled by this Court nor does it involve a Federal question in a way that conflicts with the applicable decisions of this Court. The decision of the Court below conforms with the law as handed down by this Court as well as the law in existence throughout the various circuits in the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution and the First Amendment to the United States Constitution are asserted as the Constitutional provisions involved in the Petition for Writ of Certiorari. Respondent asserts there is no substantive due process right to a speedy zoning hearing free from alleged improper evidentiary rulings.

The Abstention Doctrine is applicable as the facts of the present case clearly show that a resolution by State Court of the allegedly unsettled State Law issues would make consideration of the Federal Constitutional issues unnecessary.

STATEMENT OF THE CASE

The Petitioners purchased property in Upper Providence Township, Montgomery County, Pennsylvania and, at the time they purchased it, the Petitioners knew it was not properly zoned for the purpose of an AM radio station. Thereafter, the Petitioners sought to alter the existing Ordinance in proceedings for a curative amendment which, in effect, challenged the validity of the Zoning Ordinance. Opposition to the Petitioners' challenge came from private citizens, individuals living in the community and surrounding area, as well as the Defendant corporations. The Spring Ford School District intervened in the proceedings for the purpose of presenting one witness to testify on the effects of electromagnetic radiation which encompasses radio waves broadcast by an AM/FM radio transmitter. The series of hearings allowed for the presentation of expert evidence and rebuttal evidence which took from September 1989 to August 1992 in order to bring the matter to a conclusion. The adverse decision of the Zoning Hearing Board was then appealed by the Petitioners/ Appellants, WVCH *et al.*, to the Court of Common Pleas of Montgomery County, a State Court, where the matter is pending.

The action in Federal Court was commenced by the Petitioners, WVCH, filing two separate Complaints which were brought pursuant to 14 U.S.C. § 1983, alleging a Title 1983 cause of action arising out of the Zoning Hearing Board proceedings in Upper Providence Township. The United States District Court for the Eastern District of Pennsylvania granted the Respondents' Motion to Dismiss for failure of the Petitioners to state any viable causes of action. After the Order was entered in the lower court dismissing the Petitioners' Complaint, it was appealed to the United States Court of Appeals for the Third Circuit where the decision was affirmed. This Petition for a Writ of Certiorari follows the adverse decisions in the United States Court of Appeals for the Third Circuit.

It is of great significance that, during the Zoning Hearing Process, Petitioners, WVCH *et al.*, did not take any legal action to shorten the process as it is apparent from the record and a review of the pleadings filed that the time consumed at the hearings was in fact, directly caused by the Petitioners, who continued to present witnesses over a two-year period.

It is also significant that the Petitioners chose a 44-acre parcel in the Township that was zoned residential to locate their AM radio station. This fact alone generated wide-spread opposition among the local residents that believed they would be adversely affected and hence opposed the granting of curative amendment. The residential classification in Upper Providence Township (R-1) permits a number of agricultural and residential uses, but does not allow commercial or industrial uses, a fact well known to the Petitioners before any of the proceedings were initiated. As a result, the Petitioners mounted a massive challenge to the Zoning Ordinance with extensive hearings and voluminous record and only after they were unsuccessful did the Petitioners complain about a violation of their due process rights in a blatant attempt to utilize the Federal Courts to circumvent local zoning and in effect have the Federal Courts sit as a super zoning board.

The Respondent, Spring Ford School District, never took any action under color of State law, but nonetheless was named a Defendant in a Title 1983 Civil Rights action. The only action or activity undertaken by the Spring Ford School District was to present one expert witness whose testimony was not even questioned on cross-examination by counsel for Petitioners. The Petitioners in their Complaints did not allege that the Respondent, Spring Ford School District, itself delayed the hearing process at all. In fact, after the presentation of its witnesses, the Spring Ford School District requested that it not be required to be involved in the rest of the proceedings and the Petitioners refused to consent to the request of the District to terminate its involvement hearings.

While the Petitioners did allege that some Respondents had an economic or political incentive to act in the fashion that they did, the Petitioners never alleged nor could they allege that there was any economic or political reason for the Spring Ford School District to take the actions that it took. The School Board's action only served to protect the general welfare of the inhabitants of the School District and the children attending the public school. The public school in question was geographically located within approximately one-half to one mile from the proposed AM radio tower which the Petitioners sought to construct.

SUMMARY OF ARGUMENT

The lower court, which was affirmed by the Court of Appeals, correctly held that the Petitioners failed to state a § 1983 claim on substantive due process grounds. In order to set forth a § 1983 claim, there must be sufficient allegations to support a determination that (i) the conduct complained of has been committed under color of State law, and (ii) the alleged conduct worked a denial of rights secured by the Constitution or laws of the United States. In the present case, while the conduct complained of has arguably been committed under the color of State law, the Respondent School Board of the Spring Ford School District took no action under color of State law. The School District acted as an individual party and presented one witness at a zoning hearing. In addition, the Petitioners have alleged no rights or entitlements under State law which would support a substantive due process denial of rights secured by the Constitution or laws of the United States.

It is clear that the Petitioners have no Constitutional or State provided right to construct a radio station on their land wherever they choose and no such right is even alleged. There is no question but that the licensing of the airways is within the purview of the Federal Communications Commission but that, by itself, does not

mean that one can construct a radio tower anywhere one chooses without regard to local land use, zoning and general welfare considerations.

The test of substantive due process asks whether or not there is a rational relation between the State action and a legitimate government interest. Testimony regarding radio wave (electromagnetic radiation) potential damage is most certainly rationally related to the health, safety and welfare interests of local government and, as such, is quite proper.

The Petitioners base their right to proceed in Federal Court on allegations of various Constitutional violations. Nonetheless, in order to prevail on a § 1983 claim, the action taken against the Petitioners must be under color of State law. In the present case, the District was acting as an individual and not as a State actor and, as such, the District cannot be liable for the Petitioners' Constitutionally based claims. Under the facts alleged in the Petitioners' Complaint, it is clear that the School District was certainly not involved in any conspiracy, and no facts have been alleged which, even if believed, could support such a conspiracy action. There have been no allegations of any plots, plans or agreements between the District and other parties and without proper allegations of conspiracy, as ludicrous as they may be, the District cannot be and indeed is not liable to the Petitioners for any Constitutionally based claims.

Lastly, pursuant to the Abstention Doctrine, the Petitioners' actions are premature. Whether or not the Petitioners had in fact been deprived of a protected State Property Interest must await the outcome of their State Court appeal from the determination of the Zoning Hearing Board. Absent such a determination, the Petitioners have no right or entitlement which has been taken away from them and no cause of action for a substantive due process violation.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURT CORRECTLY CONCLUDED THAT THE PETITIONERS FAILED TO SET FORTH A CAUSE OF ACTION FOR ANY ALLEGED VIOLATION OF THE PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS.

In order to set forth a cause of action under Title 1983, a claim must allege facts sufficient to support a determination that the conduct complained of has been committed under State law and, second, that the alleged conduct worked a denial of rights secured by the Constitution or the laws of the United States. In the present case, the Petitioners are not contending that the denial by the Zoning Hearing Board of their request to construct a radio tower is relevant to a claim for denial of substantive due process. What Petitioners apparently contend is that certain adverse evidentiary rulings amounted to a denial of due process. No court has ever recognized such a premise.

It is essential for the Petitioner to establish a property right or entitlement under State law and, in default thereof, the due process clause will not afford an additional remedy to one alleging a violation. *Board of Regents v. Roth,* 408 U.S. 564, 576, 92 S. Ct. 2701, 2708 (1972). In addition, the Fourteenth Amendment Due Process Protection of Property applies only to interests a person has already acquired in specific benefits. *Board of Regents v. Roth,* 408 U.S. at 576.

Petitioners allege that they have had their rights to substantive due process of law violated, but fail to allege an *existing* property interest as a matter of right. The Supreme Court has stated, in *Board of Regents v. Roth, supra,* the following:

> Property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined by the existing rules of understandings that stem from an independent source such as State law.

In the case at bar, it is not contended that the land was ever zoned to allow the use that Petitioners seek to make of the land to wit: construction of an AM broadcast facility with a tower array. At best, the Petitioners have a possibility of an interest or benefit. In order to have a property interest in a benefit, a person must have more than a unilateral expectation, the person must, instead, have a legitimate claim of entitlement to it. *Roth,* at 408 U.S. 577.

This Court, in the cases of *Parratt v. Taylor,* 451 U.S. 527, 101 S. Ct. 1908 (1981), and *Hudson v. Palmer,* 468 U.S. 517, 104 S. Ct. 3194 (1984), established that the due process clause of the Fourteenth Amendment is not violated when a State employee either negligently or intentionally deprives an individual of property, provided that the State makes available a meaningful post-deprivation remedy. *The Petitioners in this case have a meaningful post-deprivation remedy as provided by the State Court and are in fact pursuing that remedy.*

Furthermore, the Abstention Doctrine, as espoused in the case of *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496, 61 S. Ct. 643 (1941) would apply where the resolution by State law of an unsettled issue of State law would make consideration of the Federal Constitutional issue unnecessary or change the light in which it must be viewed. This Doctrine has been reaffirmed numerous times and is well accepted law throughout the nation. As such, it is clear that, under the *Parratt/Hudson* decisions and under the Abstention Doctrine, there is no due process remedy available under the facts alleged in this case.

It must be remembered that for the Petitioners to prevail, the law in the United States, as previously espoused by the Supreme Court, would have to be so modified as to allow proceedings to go forth in Federal Court where there was an allegation of a substantive due process violation with no identifiable property interest notwithstanding the existence and availability of a State remedial process. This would require a significant change in the law of the United States with regard to the requirements and criteria for substantive due process violations a well as an abandonment of the Abstention Doctrine. Undoubtedly, this would result in the Federal Courts becoming super zoning boards where every disgruntled individual will file a complaint as soon as they do not get the relief that they request in another forum on an immediate basis.

The present case involves nothing more than a disgruntled litigant who lost his case at a Zoning Hearing Board level, appealed it to a trial court, where it is presently pending, and seeks to, on the basis of allegations of substantive due process violations, unsupported by any property interest, have the Federal Courts review the entire matter and grant him the relief requested. If this is permitted, it is respectfully suggested that there would be no purpose in conducting proceedings before Zoning Hearing Boards or State courts because the mere allegation of a due process violation would be sufficient to cause the matter to be removed, transferred or otherwise allow it to proceed in Federal Court. This would result in lower court decisions in the State court system being nothing more than advisory. It is respectfully suggested that this would constitute an unwarranted extension of Federalism into matters of purely local interest such as zoning hearings and the like.

The absence of a property interest recognized at law is fatal to the Petitioners' case. The operation of a radio station is not and has never been a right recognized by State law, or a right guaranteed by

the United States Constitution. For instance, reputation was not a property interest in the case of *Paul v. Davis,* 424 U.S. 693, 700, 96 S. Ct. 1155 (1976):

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded. Rather, he believes that the Fourteenth Amendment due process clause should *ex proprio vigore* extend to him the right to be free of injury whenever the state may be characterized as a tortfeasor. But such a remedy would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever system may already been administered by the state.

The sole state property interest upon which the Petitioners have based their lawsuit is the alleged right to have the zoning ordinance of Upper Providence Township declared unconstitutional and to be allowed as a result to establish a radio station on their property where they cannot now legally do so. This is clearly not a property interest, much less a protected property interest. As such, any reference to alleged conspiracies with regard to such interest and allegations of incorrect evidentiary rulings must fail. No court has ever suggested that such infirmities, even if present, support a substantive due process violation as there is no underlying property interest.

Finally, in the present case, there is no averment whatsoever that the Spring Ford School District was acting under the color of State law in participating in the Zoning Hearing Board proceedings. The only averment which would feasibly bring the District under the umbrella of the Complaint filed by Petitioners is the broad allegations that the "Defendants" acted together to deprive the Petitioners of their due process rights. There have been

no allegations whatsoever, regarding an underlying plot, plan, or intent to form a conspiracy between the School Board of the Spring Ford School District and the other Respondents and these omissions are fatal to the Constitutional causes of action alleged by the Petitioners.

II.

THE FCC, BY THE GRANTING OF AN AM BROADCAST LICENSE, DID NOT CONFER ANY AUTHORITY OR RIGHT TO CONSTRUCT A RADIO STATION AT ANY LOCATION A LICENSEE MAY SO CHOOSE, BUT RATHER STATED THE FREQUENCY AND AREA TO BE SERVICED BY SAID LICENSE.

The issue of FCC pre-emption of local zoning ordinances has been decided against federal pre-emption. The most significant case in the Third Circuit addressing this issue is *Kroeger v. Stahl,* 248 F.2d 121 (3d Cir. 1957), which involved a challenge to a municipal zoning ordinance on a claim of pre-emption. The ordinance prohibited a radio station owner from erecting a 75-foot tower. The facility was licensed by the FCC and had temporary authorization to conduct ratio tests. The court dealt with the pre-emption issue and stated the following at page 123:

> As to whether or not the ordinance is inconsistent with powers delegated by Congress to the Federal Communications Commission . . . the following quotations set forth in the opinion of the District Court are appropriate: . . . The principle is generally established that the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so

> "direct and positive" that the two acts cannot "be reconciled" where consistently stated together.

In the *Kroeger* case, the court went on to state that an ordinance is acceptable when it is reconcilable with the provisions of the FCC Act of 1934 as amended pertaining to the regulation of radio broadcasting. *Id.* at 123. As the Upper Providence Township Zoning Ordinance does not conflict with the FCC Act, there is no pre-emption problem.

In order for the Petitioner to prevail, the law would have to be so construed as to allow the holder of an FCC license to construct a facility any place that he wanted to regardless of the impact upon the local area. This would be a result not envisioned by the FCC merely by the granting of broadcast licenses.

Petitioner has not overcome the presumption of validity of the Zoning Ordinance allowing the municipality to restrict the use of property in certain zones, nor has the Petitioner established such irreparable injury as to constitute a deprivation of property or a clearly arbitrary or unreasonable restriction as to the use of his property. The decision by the Zoning Hearing Board to hear testimony regarding radio wave (electromagnetic) damage is well within its proper exercise of police power. Petitioner's allegations do not set forth claims for a denial of substantive due process under the Constitution and laws of the United States.

CONCLUSION

The opinion of the Court of Appeals of the Third Circuit in affirming the lower court decision that there was no violation of the due process clause of the Fourteenth Amendment was decided on well-settled principles of constitutional law. There is no need for FCC pre-emption of local zoning laws with regard to the actual physical location of AM radio stations and the construction of towers. The Petitioners have not alleged any property right entitling them to maintain a claim for violation of their substantive due process rights. Respondents therefore request that your Honorable not grant certiorari.

Respectfully submitted,

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No. 94-225

In The

Supreme Court of the United States

October Term, 1994

WVCH COMMUNICATIONS, INC. and THOMAS H. MOFFIT, et ux.,

Petitioners,

v.

UPPER PROVIDENCE TOWNSHIP, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS RHONE-POULENC RORER PHARMACEUTICAL, INC., STERLING RESEARCH GROUP AND SUE TIEFENTHALER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Judgment Order of the United States Court of Appeals for the Third Circuit affirming the decision of the District Court that Petitioners had no substantive due process right to be free from delay in local administrative proceedings was contrary to prior decisions of this Court and of the Third Circuit itself.

2. Whether the Court of Appeals correctly affirmed the decision of the District Court dismissing Petitioners' action for a declaratory judgment that federal law pre-empts consideration by a local zoning hearing board of evidence of radio frequency interference where the board denied Petitioners' application to construct a proposed radio station on independent and unrelated grounds.

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**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF OF RESPONDENTS RHONE-POULENC RORER PHARMACEUTICAL, INC., STERLING RESEARCH GROUP AND SUE TIEFENTHALER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Rhone-Poulenc Rorer Pharmaceutical, Inc. ("RPR"), Sterling Research Group ("Sterling") and Sue Tiefanthaler respectfully request that this Court deny the petition of WVCH Communications, Inc. ("WVCH"), Thomas H. Moffit and Alice E. Moffit (the "Moffits") for a writ of certiorari to review the judgment order of the United States Court of Appeals for the Third Circuit in *WVCH Communications, Inc. v. Upper Providence Township*

and *WVCH Communications, Inc. v. Kalil*, Nos. 93-1711 and 93-1712 (3d Cir. May 4, 1994).[1]

COUNTERSTATEMENT OF THE CASE

A. Nature of the Case

The present petition constitutes the Moffits' latest attempt to obtain federal appellate review of the evidentiary rulings and decision of a local zoning hearing board in proceedings on the Moffits' application to build a six-tower, 50,000-watt radio station in a residential district, even though the Moffits have an appeal pending in state court. Through a combination of misstatements[2] and citations to inapposite authority, the Moffits appear to contend that such unprecedented and plenary federal oversight of local administrative proceedings is necessary to prevent alleged deprivation of a purported substantive due process right to be free from delay. In fact, as discussed below, no such right exists, and the rejection of the Moffits' arguments by the Court of Appeals and the district court was entirely consistent with settled law.

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[1] Pursuant to Supreme Court Rule 29.1, respondents represent that: (a) RPR is a second-tier subsidiary of Rhone-Poulenc Rorer, Inc.; and (b) Sterling is a division of Sterling Winthrop, Inc., which is a subsidiary of Eastman Kodak Company.

[2] The Moffits' so-called "Statement of the Case" contains many allegations not previously pleaded, either in the Moffits' complaints or their briefs below.

B. Factual and Procedural Background

1. The Proceedings Before the Board

a. The Moffits' Application

The Moffits are the owners of WVCH, a for-profit entity presently operating an AM radio station in the Philadelphia area. (Complaint, No. 92-CV-5755 (E.D.Pa.) (the "1992 Complaint")[3], ¶¶ 7, 8, 15 and 77.) In an effort to expand WVCH's broadcast area, the Moffits purchased property in a residential neighborhood in Upper Providence Township (the "Township") with the intention of relocating WVCH's radio studios and erecting six 250-foot towers there, with increased broadcasting power of 50,000 watts. (1992 Complaint, ¶ 77.)

The Moffits chose a 44-acre parcel in the Township for the facility even though the property was (and is) zoned R-1 Residential. The R-1 Residential Zoning Classification permits a number of agricultural and residential uses, but does not allow commercial or industrial uses. (1992 Complaint, ¶ 15.)

The Moffits filed an application (the "Application") before the Upper Providence Township Zoning Hearing Board (the "Board") challenging the Upper Providence Zoning Ordinance (the "Ordinance"), alleging that the Ordinance unconstitutionally excludes radio broadcast facilities from the Township. (1992 Complaint, ¶ 89.) Relying on Pennsylvania's exclusionary zoning doctrine

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[3] As discussed below, the Moffits filed two related complaints in the district court, only the first of which named respondents herein.

and the procedures of the Municipalities Planning Code, the Application alleged that the Ordinance excluded the Moffits' proposed use (a radio broadcast facility, or studio) throughout the Township, resulting in a *de jure* exclusion, and that the Ordinance's height restrictions prohibited construction of the towers, resulting in a *de facto* exclusion.

b. The Law Governing the Moffits' Application

Under Pennsylvania law, the Board could not declare the Ordinance to be exclusionary unless: (a) the Moffits established that (i) it excluded the proposed use entirely from the Township and (ii) the proposed use was not objectionable by nature; and (b) the exclusion was not otherwise justified. *See Township of Paradise v. Mt. Airy Lodge*, 68 Pa. Commw. 548, 552, 449 A.2d 849, 852 (1982).

The successful challenger of an exclusionary zoning ordinance is generally entitled to "receive a bounty in the form of an opportunity to proceed with the requested use." *Cracas v. Board of Supervisors of West Pikeland Twp.*, 89 Pa. Commw. 424, 430, 492 A.2d 798, 801 (1985). Site specific relief, however, is not automatic. Opposing parties are entitled to establish that an applicant's plan is incompatible with a proposed site, *Fernley v. Board of Supervisors of Schuylkill Twp.*, 509 Pa. 413, 422, 502 A.2d 585, 589 (1985), and the Board has authority to determine the suitability of the site for the particular proposed use based on a full factual record. *See Harbucks, Inc. v. Supervisors of Nockamixon Center Hill*, 126 Pa. Commw. 591, 599-600, 560 A.2d 851, 855-56 (1989).

c. The Hearing Before the Board

Respondents RPR and Sterling are unrelated pharmaceutical companies with world headquarters in the Township located approximately one mile and 1/2 mile, respectively, from the Moffits' property. RPR and Sterling intervened in the proceedings before the Board to oppose the Application because of concerns that electromagnetic radiation emanating from a 50,000-watt station would present a potential risk of interference with sensitive research equipment and instruments used by the pharmaceutical companies. (1992 Complaint, ¶¶ 47-49.)

In addition to RPR and Sterling, the Township itself, a citizens group known as Citizens Against Radio Towers ("CART"), allegedly headed by respondent Sue Tiefenthaler (1992 Complaint, ¶ 12), and the Spring-Ford School District and Franklin Heritage Associates, the developer of a proposed townhouse development adjacent to the Moffits' property (Complaint, ¶ 26), all appeared before the Board to oppose the Application.

In the portion of the hearings devoted to the issue of the suitability of the site for the Moffits' proposed use, each party offered testimony concerning, *inter alia*, the magnitude of radio frequency interference ("RFI") and potential risk to neighbors. (Complaint, ¶¶ 31, 50-52.) The Board concluded taking testimony in July 1992, heard final arguments in August 1992, and convened at an advertised public hearing on October 2, 1992 to render its decision.

The Board determined that the Moffits could build their proposed radio station as of right in four other

districts in the Township, including industrial districts that expressly permit utilities and similar installations, and therefore that the Ordinance neither *de jure* nor *de facto* excluded the Moffits' proposed facility from the Township. Because the Board concluded that the Moffits failed to carry their legal burden on the threshold question of proving an exclusion, the Board never reached the factual issues of whether an exclusion would be justified or whether the Moffits' site was a suitable location for a radio station. Accordingly, the Board's decision did not address RFI.

2. The Moffits' State Court Appeal

Under Pennsylvania law, the Moffits had a right to appeal the findings of the Board to the Court of Common Pleas, which is authorized to take additional evidence. 53 P.S. § 11001-A, *et seq.* The Moffits exercised this statutory right by filing a Notice of Land Use Appeal, which, *sub nom Appeal of Thomas H. Moffit and Alice C. Moffit From the Decision of the Upper Providence Township Zoning Hearing Board,* is presently pending in the Court of Common Pleas of Montgomery County, Pennsylvania, No. 92-21993. The Moffits' grounds for their state zoning appeal include all the issues raised in their federal Complaints.

3. The Proceedings Before the District Court

On October 2, 1992, the day that the Board announced its decision, the Moffits filed the 1992 Complaint, naming as defendants the Township, the Board, RPR, Sterling, and Sue Tiefenthaler. The 1992 Complaint

essentially charged that defendants had conspired to delay the hearing process through the introduction and admission of allegedly false and irrelevant evidence concerning the effects of RFI. The Moffits sought, *inter alia*, damages pursuant to 42 U.S.C. § 1983 for a litany of purported constitutional violations and a declaratory judgment that RFI is preempted from local consideration as a matter of federal law.

Defendants moved to dismiss the 1992 Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In two opinions dated December 23, 1992 and February 12, 1993, respectively, the district court, *inter alia*: (a) dismissed the Moffits' § 1983 claims based upon purported procedural due process, equal protection and First Amendment violations;[4] (b) declined to dismiss the Moffits' substantive due process claims in light of certain language in *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988); and (c) held that "[p]laintiffs' claim for declaratory relief must be dismissed because there is no live dispute between the parties on the [RFI] issue." (Memorandum of Buckwalter, J. (Dec. 23, 1992), Moffits' Petition for Writ of Certiorari ("Moffits' Pet.") at 25a.)

On April 26, 1993, the Moffits filed a second complaint in this matter, No. 93-CV-2225 (E.D.Pa.) (the "1993 Complaint"), restating the basic factual allegations of the 1992 Complaint but naming as defendants Board members Walter Kalil and Clay Hess, Kalil Printing, Inc., and

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[4] The Moffits have not challenged those aspects of the district court's decision on appeal.

the School Board of Spring-Ford School District. Defendants there filed motions to dismiss the 1993 Complaint, which the district court granted by memorandum and order dated July 15, 1993.

The district court explained its dismissal of the Moffits' substantive due process claim in the 1993 Complaint as follows:

> Subsequent to the issuance of the December 23 memorandum, the Third Circuit Court of Appeals stated that "to prevail on a *substantive* due process claim, a plaintiff must demonstrate that an arbitrary and capricious act deprived them of *a protected property interest.*" *Taylor Invest., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1290 (3d Cir. 1993) (emphasis added). That decision, together with my re-evaluation of other cases including *Bello*, lead me to conclude that defendants are correct in asserting that plaintiffs must show a protected property interest before being able to state a substantive due process claim. Plaintiffs have made no such showing, and indeed, cannot do so unless and until it is proven that they are entitled to the zoning variance which they sought, an issue currently pending in the state court. Plaintiffs contend that the unreasonable delay in deciding their application is the basis for their substantive due process violation. While defendants' alleged action, if proven, would seem to be a clear example of "deliberate and arbitrary abuse of government power," *Bello*, 840 F.2d at 1129, under the law of this circuit it does not state a

> substantive due process claim unless accompanied by a protected property interest. Therefore, I dismiss plaintiffs' § 1983 count insofar as it is based on substantive due process.

(Memorandum of Buckwalter, J. (July 15, 1993), Moffits' Pet. at 10a-11a.) In conjunction with this decision, the district court issued an order vacating its December 23, 1992 ruling "to the extent that it denied defendants' motion to dismiss the substantive due process count [in the 1992 Complaint]" and granting the motion to dismiss that count. (Order of Buckwalter, J. (July 15, 1993), Moffits' Pet. at 14a.)

4. The Proceedings Before the Court of Appeals

The Moffits appealed from the district court's orders of July 15, 1993, arguing that "an intentional, biased, and politically motivated delay" in an administrative hearing process could itself rise to the level of a substantive due process violation. (Moffits' Appellate Brief at 18). Unable to identify the particular constitutional right of which they were deprived, the Moffits appeared to contend that freedom from delay was itself a "substantive due process Constitutional right." (*Id.* at 24). They were forced to concede the obvious – that "[r]esearching these matters makes [it] plain" that no such right exists – yet insisted that, in the present case, "we would be constrained not to fashion one." (*Id.*)

The Moffits also sought to raise on appeal a purported "federal pre-emption/1st Amendment issue refused by the District Court" with respect to RFI. (*Id.* at 26.) Significantly, they did not challenge – or even

address – the holding of the district court that "there [wa]s no live dispute between the parties on the [RFI] issue," but instead simply requested that the Court of Appeals "review" the RFI issue to "find" that alleged "[f]ederal pre-emption of the electromagnetic broadcast spectrum by the FCC also pre-empts . . . any local zoning regulations or actions" touching upon the RFI question. (*Id.* at 28.)

By Judgment Order dated May 4, 1994, the Court of Appeals, "[a]fter consideration of all contentions raised by the appellants," affirmed the district court's July 15, 1994 Orders in their entirety. (Judgment Order of Court of Appeals (May 4, 1994), Moffits' Pet. at 4a.) A petition for rehearing was denied.

SUMMARY OF ARGUMENT

In an attempt to create an issue worthy of this Court's attention, the Moffits contend in their petition that:

> [t]he opinion of the Court of Appeals for the Third Circuit is in violation of the Due Process Clause of the Fourteenth Amendment and is contrary to, *inter alia*, its own decisions in *Bello v. Walker* and *Taylor Invest, Ltd. v. Upper Darby Township* and is also contrary to this Court's holding in *Daniels v. Williams*, and the opinion of the Court of Appeals for the Third Circuit also fails to recognize the need for FCC preemption of local zoning laws in the location of AM radio stations.

(Moffits' Pet. at 17.) In fact, the Judgment Order dated May 4, 1994 is entirely consistent with settled case law as decided by this Court and followed uniformly by the courts of appeals with respect to substantive due process. The Court of Appeals likewise properly refused to issue an advisory opinion concerning an RFI issue that was not justiciable. The Moffits' petition thus satisfies none of the "special and important reasons" customarily considered by this Court as a basis for granting certiorari.

ARGUMENT

A. The Court of Appeals' Rejection of Petitioners' Argument for a Substantive Due Process Right to Be Free from Allegedly Erroneous Rulings Resulting in Delay in Local Administrative Proceedings Was Consistent with Settled Law

The Fourteenth Amendment to the United States Constitution provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Notwithstanding the breadth of this language, "it is well settled that only a limited range of interests fall within this provision." *Hewitt v. Helms*, 459 U.S. 460, 466 (1983). Accordingly, "the Fourteenth Amendment does not require a remedy" unless there has been some deprivation *"of a protected interest."* *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (emphasis added).

In *Daniels v. Williams*, 474 U.S. 327 (1986), this Court examined only the nature of the "deprivation" necessary to implicate the Due Process Clause where the requisite

protected interest – in that case, freedom from bodily injury – has already been established. Indeed, in writing for the majority, Chief Justice (then Justice) Rehnquist expressly admonished that "in any given § 1983 suit, the plaintiff must still prove a violation of [an] underlying constitutional right" as a threshold matter. *Id.* at 330. The alternative, to paraphrase the Court, "would trivialize the centuries-old principle of due process of law." *Id.* at 332.

Consistent with *Daniels*, the decisions of the Third Circuit in *Taylor Invest., Ltd. v. Upper Darby Township*, 983 F.2d 1285, and *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988), make clear that a plaintiff cannot state a substantive due process claim for alleged government abuse without establishing some protected interest of which he has allegedly been deprived. *See Taylor*, 983 F.2d at 1292. Although the *Bello* opinion does not directly address the requirement of a protected interest *per se*, plaintiff there possessed such an interest in a building permit – allegedly denied by defendants for partisan political or personal reasons – to which a state court expressly held that he was entitled. Moreover, the *Bello* court based its decision upon authority of this Court, including *Daniels* and *Davidson*, that underscores the need to identify a protected interest in order to state a due process claim.

The Judgment Order of the Court of Appeals affirming the district court's dismissal of the Moffits' Complaints is not – as petitioners erroneously contend – "contrary" to the decision of this Court in *Daniels* or to the prior decisions of the Third Circuit in *Taylor* and *Bello*. (Moffits' Pet. at 17.) The district court ruled that, notwithstanding allegations of irregularities in the zoning

hearing process, plaintiffs could "not state a substantive due process claim unless [such irregularities were] accompanied by [the deprivation of] a protected property interest." (Memorandum of Buckwalter, J. (July 15, 1993), Moffits' Pet. at 11a.) This ruling is consistent not only with the decisions of this Court and of the Third Circuit,[5] but also with the uniform holdings of the other courts of appeals that due process claims in the zoning context are contingent upon the possession of a property interest in the benefit sought.[6]

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[5] The Third Circuit recently reaffirmed that, "[w]hen complaining of a violation of substantive due process rights, a plaintiff must prove that the governmental authority acted to 'infringe[] a property interest encompassed by the Fourteenth Amendment." *Acierno v. Cloutier*, Nos. 93-7456, 93-7617, 1994 U.S. App. LEXIS 16714, *56 (3d Cir. July 7, 1994), quoting *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 679 (3d Cir. 1991), *cert. denied*, 112 S.Ct. 1668 (1992).

[6] *See, e.g., Orange Lake Assocs., Inc. v. Kirkpatrick*, 21 F.3d 1214 (2d Cir. 1994) (affirming summary judgment for defendants on due process claim for "unreasonable delays" in approving development application where plaintiff "did not have a vested property interest" therein); *Biser v. Town of Bel Air*, 991 F.2d 100 (4th Cir. 1993) (affirming dismissal of § 1983 action in which plaintiff "claim[ed] that he had been denied due process by the Town's delay in granting his special exception" on grounds that plaintiff's "belie[f] that the Board acted arbitrarily on his application does nothing to change the fact that he was not deprived of any entitlement or right"); *Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921 (5th Cir. 1988) (affirming dismissal of due process challenge to utility district's refusal to annex a particular tract of land where "the discretion apparently granted [the District] by [Texas] statutes" precluded existence of requisite property interest).

The Moffits' contention that the Court of Appeals somehow "stop[ped] short" in affirming the district court's decision because that decision mentioned only "property rights, as opposed to [revealing] a proper appreciation of a citizen's liberty interests" (Moffits' Pet. at 10), is simply wrong. The district court nowhere suggested that the deprivation of a protected liberty interest would not implicate the Fourteenth Amendment; it merely recognized that the Moffits possessed no such interest in this case. Indeed, whatever the precise contours of the constitutional liberty interest may be, *see Ingraham v. Wright*, 430 U.S. 651, 673 (1977), it is axiomatic that they do not extend to a party's voluntary presence at a hearing on his own application for a benefit to which he is not entitled.

To the extent that the Moffits allege a deprivation of a claimed right to a speedy administrative hearing devoid of evidentiary errors, they are claiming no more than a procedural due process violation. Yet the Moffits have never contested the district court's finding that their Complaints failed to state a § 1983 claim for denial of procedural due process because Pennsylvania provides "a meaningful post-deprivation remedy" for any such procedural claims under *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). (Memorandum of Buckwalter, J. (Dec. 23, 1992), Moffits' Pet. at 20a-21a.) *See also Rogin v. Bensalem Township*, 616 F.2d 680, 695 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) (holding that "[i]n Pennsylvania, the procedure for challenging zoning ordinances substantially conforms with the general due process guidelines enunciated by the Supreme Court").

Ultimately, the Moffits have attempted to create a decisional conflict where one does not exist. They ask this Court to do what the Court of Appeals and the district court properly declined to do, namely, to recognize for the first time a distinct substantive due process right to be free from allegedly "arbitrary" delay in local administrative hearings. In rejecting analogous requests, this Court has observed:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26, 106 S.Ct. 507, 513-14, 88 L.Ed.2d 523 (1985). The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, Texas, 112 S.Ct. 1061, 1068 (1992). The Moffits do not and cannot proffer a cogent reason for "break[ing] new ground" in this case.

On the contrary, accepting the Moffits' argument would effectively create a potential federal due process claim every time a local administrative board – or court, for that matter – makes an evidentiary ruling with which a litigant disagrees. To assess the Moffits' purported due process claim in this case would require an exhaustive review of the record of the proceedings before the Board to determine the circumstances under which particular testimony or evidence was admitted or not admitted. Such an undertaking by a federal court would usurp the

state court's function in the proceedings presently pending in the Court of Common Pleas of Montgomery County, Pennsylvania, and would be contrary to the well-settled rule that the role of a federal court "should not be to sit as a zoning board of appeals." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

B. Petitioners' Purported Preemption Claim Does Not Present a Justiciable Controversy

Article III of the United States Constitution limits the judicial power of federal courts to actual "cases" and "controversies." This Court has said of this requirement that:

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically reviewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 95 (1968). The Moffits' request for a ruling that FCC approval of a radio station must preempt local zoning ordinances fails the test of justiciability in both aspects of the term.

First and foremost, the desired preemption ruling would clearly constitute a purely advisory opinion, and "it is quite clear that 'the oldest and most consistent

thread in the federal law of justiciability is that the federal courts will not give advisory opinions.' " *Id.* at 96, quoting C. Wright, *Federal Courts*, p. 34 (1963). *See also Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (warning that this Court "do[es] not sit to decide hypothetical issues or to give advisory opinions"). The hearings in which the Board permitted the introduction of RFI evidence have long since concluded, and, because of the Moffits' failure to carry the burden of establishing the unconstitutionality of the zoning ordinance, the Board did not reach the issues of site suitability, including the evidence on both sides concerning electro-magnetic radiation, in its decision.[7] Indeed, the Moffits have never contested the express finding of the district court that "there is no live dispute between the parties on the [RFI] issue" (Memorandum of Buckwalter, J. (Dec. 23, 1992), Moffits' Pet. p. 25a), which itself established the lack of the requisite case or controversy. *See Golden v. Zwickler*, 394 U.S. 103, 110 (1969) (constitutional questions "must be presented in the context of a specific live grievance" to create federal jurisdiction).

The Moffits seem to be attempting to escape the fatal shortcomings in their RFI preemption claim by raising here for the first time the argument that FCC approval of a site for a proposed radio station should as a general matter override local zoning ordinances. They acknowledge that "the FCC has never asserted [its purported]

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[7] In recent years, the effects of electro-magnetic fields have increasingly become a matter of public concern. *See* T. Watson and C. Reiner, "The Scientific and Legal Bases for Litigating EMF Property Cases," in *Current Condemnation Law* (1994).

preemptive authority to ignore local zoning powers in the limited area of locating stations," yet simply proclaim that such authority "undoubtedly exists" and, invoking some ill-defined interest in "optimum use of the airwaves," ask this Court to exercise that purported authority on behalf of the FCC. (Moffits' Pet. at 16.)

The flaws in this argument are several, not the least of which is that the Moffits failed to raise it below. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (enunciating "the general rule . . . that a federal appellate court does not consider an issue not passed upon below"). Additionally, the Moffits' submission of their Application to the Board under the procedures set forth in the Pennsylvania Municipalities Planning Code was an acknowledgement of the Board's authority and the absence of federal preemption. Finally, the judicial usurpation of the FCC's rule-making authority urged by the Moffits (particularly when the FCC is not a party to this action) would violate "the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast*, 392 U.S. at 95.

CONCLUSION

For the foregoing reasons, Respondents Rhone-Poulenc Rorer Pharmaceutical, Inc., Sterling Research Group and Sue Tiefanthaler respectfully request that the Court deny the Moffits' petition for writ of certiorari.

Respectfully submitted,

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